IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1870

WHIRLPOOL CORPORATION, PETITIONER

vs.

RAY MARSHALL, SECRETARY OF LABOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

By: ROBERT E. MANN,
RONALD J. HEIN, JR.,
MARK A. LIES, II,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
Suite 4200,
55 East Monroe Street,
Chicago, Illinois 60603,
(312) 346-8000,
Attorneys for Petitioner.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Whirlpool Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW.

The opinion of the court of appeals (App. A, *infra*, pp. A1-A39) is reported at 593 F. 2d 715. The opinion of the district court (App. C, *infra*, pp. A43-A49) is reported at 416 F. Supp. 30.

JURISDICTION.

Timely petitions for rehearing and rehearing *en banc* were denied by the court of appeals on April 4, 1979 (App. B, *infra*, pp. A40-A42). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Whether the Secretary of Labor exceeded his authority in promulgating a regulation pursuant to the provisions of the Occupational Safety and Health Act of 1970, which grants to employees a new right to refuse to perform assigned tasks, without resort to the expressly established statutory procedure, based on an employee's own subjective determination that he or she would be exposed to a dangerous condition.

STATUTE INVOLVED.

The relevant provision of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U. S. C. 651 *et seq.*) provides, in pertinent part (29 U. S. C. 660(c)(1)):

> "(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

STATEMENT.

This action was instituted by the Secretary of Labor under Section 11(c)(1) of the Occupational Safety and Health Act of 1970 (29 U. S. C. 660(c)(1); hereinafter "the Act"), and regulations promulgated thereunder. Section 11(c)(1) prohibits

an employer from discharging or in any manner discriminating against any employee "because of the exercise by such employee . . . of any right afforded by this Act."[1] The Secretary alleged that Petitioner unlawfully disciplined two of its employees for refusing to perform a particular assignment believed by the employees to present a dangerous situation, and that said discipline was in retaliation for the exercise by the employees of a right "afforded by this Act."

In support of his allegation, the Secretary relied on regulations which he has promulgated interpreting Section 11(c)(1) of the Act. In pertinent part the regulation, published at 29 C. F. R. 1977.12 (App. D, *infra*, pp. A50-A57), provides:

> "(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance

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1. Section 11(c)(2) of the Act, 29 U. S. C. 660(c)(2), in pertinent part, provides that:

> [a]ny employee who believes he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. * * * The Secretary shall cause such investigation as he deems appropriate. If * * * the Secretary determines that * * * this subsection ha[s] been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the * * * courts shall have jurisdiction * * * to restrain violations of [11(c)(1)] and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

Section 11(c)(3), 29 U. S. C. 660(c)(3) directs the Secretary to notify the complainant of his determination under Section 11(c)(2) within 90 days of the complaint's receipt.

of other public agencies which have responsibility in the field of safety and health . . .

"(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The conditions causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury, and that there is insufficient time due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain a correction of the dangerous condition."

Following a full trial, the district court entered judgment for Petitioner, reaching the conclusion "that the regulation in question is clearly inconsistent with the statute and therefore invalid" (App. C, *infra*, p. A47). The court explained that "[t]he reason for this holding is that the Congress squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not." (*Id.*).[2]

On appeal by the Secretary,[3] the court of appeals observed that "[t]wo district courts below ruled that this regulation is

2. The court further held that, had the Secretary's regulation been valid, the employees would have been justified under the facts of the case in refusing to perform the particular work assignment. This finding was the subject of a cross-appeal by Petitioner.

3. The instant action was part of a consolidated appeal by the Secretary. In the companion case the Secretary appealed a decision of the United States District Court for the Southern District of Ohio granting Empire-Detroit Steel Division, Detroit Steel Corporation's motion to dismiss the Secretary's complaints for failure to state a claim upon which relief could be granted.

invalid because it has no statutory support and because OSHA's legislative history reveals Congressional intent at odds with the regulation" (App. A, *infra*, p. A2). The appellate court, however, was unpersuaded by the district court decisions and reversed those judgments based upon the twofold finding "that the Secretary's regulation is consistent with the stated purposes of the Act and its legislative history, and that it represents an appropriate employment of the regulatory power conferred upon the Secretary by the statute . . ." (App. A, *infra*, p. A2).

REASONS FOR GRANTING THE PETITION.

1. The decision of the court of appeals that the regulation in question is consistent with the statute, and with Congressional intent as manifested in the legislative history, is clearly erroneous and warrants review. In so holding, the court has disregarded the established principle that where an inconsistency between a regulation and a statute is so patent, a court has no alternative but to hold that the administrator has exceeded his authority and employed means not appropriate to the end elucidated in the Act. *See, e.g., Gardner* v. *United States*, 239 F. 2d 234 (5th Cir. 1956); *see also Commissioner of Internal Revenue* v. *South Texas Lumber Company*, 333 U. S. 496 (1941).

The existence of such an inconsistency in the case at bar is readily apparent. The Secretary's own interpretation of the protection afforded by Section 11(c)(1) begins with the revealing admission that "[r]eview of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 C. F. R. 1977.12(b)(1).

The court of appeals, however, has ignored the Secretary's own interpretation of the Act and its legislative history, and has permitted the Secretary to accomplish administratively what Congress expressly denied him legislatively. The court's holding

is premised in large part upon the emotional, and unfounded, opinion that "29 U. S. C. § 660(c)(1)'s requirement that employers not retaliate against complaining employees should be read broadly, otherwise the Act would be gutted by employer intimidation" (App. A, *infra*, p. A12). Based upon this faulty presumption, the court held that "this regulation must be upheld in light of the deference given administrative interpretation of statutes, the broad reading traditionally given remedial statutes and the broad policy factors which underlie the regulation" (App. A, *infra*, p. A19).

The Secretary's regulation clearly provides the basis for potential abuse or, at best, is grounds for endless litigation. It permits an employee to subjectively determine that a dangerous condition exists, and to walk off the job until the employee determines that the hazard has been abated, without even requiring the employee to first resort to available statutory procedures. An employer is thus faced with making the determination of whether the employee's refusal is in "good faith," whether his fears are "reasonable" and ultimately must either allow his operation to be suspended or face litigation. Surely, after examining the situation and determining that the employee's fears are groundless, an employer's decision to continue the work must be accorded "good faith." To hold otherwise would give credence to the suggestion that most employers operate in callous disregard for the health and safety of their employees. Congress itself refused to make this assumption, noting that if employees informed their employers of an apparent hazardous condition then "99 times out of 100" the employer would correct it.[4] Where a "good faith" disagreement exists, employees may resort to the express statutory provisions. However, where Congress has given employers the benefit of the doubt, the courts must be required to do likewise.

2. There is likewise no merit to the court's conclusion that the right granted in the regulation may be implied from the

4. *See* 116 Cong. Rec. 38, 367-386; 116 Cong. Rec. 37, 327-346 (1970).

Act's overall remedial purpose. (*Id.*). In fact, Congress' failure to include such a right in the Act assumes even greater significance when contrasted with the express provisions for other varied and numerous employee rights. These rights include, *inter alia*, the right to challenge in the court of appeals the validity of a standard issued by the Secretary (29 U. S. C. 655(f)); the right to accompany inspectors during inspection (29 U. S. C. 657(e)); the right to file complaints or notify the Secretary of an alleged violation (29 U. S. C. 657(f)(1)(2)); the right to participate as a party at hearings and to contest the reasonableness of abatement periods (29 U. S. C. 659(c)); and the right to petition the court of appeals to review final orders of the Occupational Safety and Health Review Commission in cases involving their employer (29 U. S. C. 660(a)).

The familar rule of statutory construction—"expressio unius est exclusio alterius"—compels the conclusion that employees do not enjoy a protected right under the Act to walk off the job. Congress fully considered employee rights when it drafted the Act and elected not to provide the right contained in the Secretary's regulation. In similar statutes where Congress has elected to provide such rights, it has expressly done so.

For example, Section 502 of the Labor Management Relations Act, 29 U. S. C. 143, provides that "the quitting of labor by an employee . . . in good faith because of abnormally dangerous conditions for work at the place of employment . . . [shall not] be deemed a strike under this chapter." Clearly, Congress could have employed similar language to make the discharge of an employee a discriminatory act.

Similarly, in the recently enacted Federal Mine Safety and Health Act of 1977, 30 U. S. C. 801 *et seq.*, Congress expressly granted to the Secretary the right to order a shut down of a mine administratively, and to order the withdrawal of employees from the mine with pay, a right expressly denied under the Act. The power to order such withdrawal with pay is not limited to imminently dangerous situations, but includes nonabatement of

hazardous conditions, "unwarrantable failures" to comply with standards, and even violation of a miner's training requirements. 30 U. S. C. 814(b)-(h), 817. The amount of pay a miner is to receive when a withdrawal order is issued is also specified. 30 U. S. C. 814(g)(2), 821.

It is, therefore, readily apparent that the court of appeals erred in concluding that the right contained in the Secretary's regulation may be implied from the Act's overall remedial purpose. Quite the contrary, the absence of any expressed protection such as that contained in the Secretary's regulation reflects a Congressional intent not to extend such a "right" to employees.

3. Nor is there any merit to the court's attempt to distinguish the Secretary's regulation from the "strike with pay" provision which was rejected by Congress (App. A, *infra*, pp. A26-A29, A35). Indeed, the court's conclusion that an employee must be prepared to forego pay if necessary to escape the hazard is completely contradictory to the interpretation of Section 11(c)(1). Clearly, if the employee has a "right" to refuse to work in the presence of a hazardous condition, then the denial of pay to an employee who exercises that right would certainly be considered to have a "chilling effect" on that right, and be considered discriminatory "in any manner" under Section 11(c)(1).

In support of the above, it must be noted that the Secretary has issued an interpretive rule amending a regulation which states that any failure by employers to pay employees for time spent accompanying an OSHA inspector during an inspection would be discriminatory under Section 11(c) of the Act. (42 Fed. Reg. 47344, amending 29 C. F. R. 1977.21.) This revised interpretation is a complete reversal of the position previously taken by the Secretary, which held such time not to be compensable because the activity was not normal work activity. (*See* 38 Fed. Reg. 2681, Jan. 29, 1973.)

If the Secretary now feels that the denial of pay to employees who exercise their "walkaround" right is discriminatory, then

he cannot seriously assert that there is a distinction between that right and the right to refuse to work under conditions established by the regulation. Thus, the Secretary does, indeed, create the potential for a "strike with pay" which Congress rejected.

4. The court of appeals acknowledges that there is no express provision in the Act conferring jurisdiction upon federal district courts to decide the right of an employer to discipline an employee who refuses to work based upon the employee's claim that an assigned job would subject him to danger (App. A, *infra*, pp. A1-A2). The only grant of such jurisdiction is pursuant to a regulation which the court of appeals has upheld because it is "in no way inconsistent with the Act's purposes" (App. A, *infra*, p. A19).

The court's decision creates a likelihood of substantial future litigation before the district courts on labor relations matters such as strikes and employee discipline heretofore repeatedly held to be within the exclusive province of the National Labor Relations Board. In this respect, it should be noted (1) that the court's decision apparently vests the Secretary with the power to invoke or withhold district court jurisdiction as a purely discretionary matter and (2) that the court's decision apparently confers upon employees a new right to strike or otherwise refuse to perform work without loss of pay, a right which plainly has not been conveyed by Congress.

5. The court's decision squarely conflicts with that of the Fifth Circuit Court of Appeals in *Marshall* v. *Daniel Construction Co.*, 563 F. 2d 707 (5th Cir. 1977), *cert. denied*, ... U. S. ....., 99 S. Ct. 216 (October 2, 1978). The decision also conflicts with the decision of the Tenth Circuit Court of Appeals in *Marshall* v. *Certified Welding Corporation, et al.*, ... F. 2d ....., 7 OSHC 1069 (BNA, 10th Cir., December 28, 1978),

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

By: ROBERT E. MANN,
RONALD J. HEIN, JR.,
MARK A. LIES, II,

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
Suite 4200,
55 East Monroe Street,
Chicago, Illinois 60603,
(312) 346-8000,
Attorneys for Petitioner.

APPENDIX A.

Nos. 76-2143 and 2144
No. 76-2261

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

RAY MARSHALL, SECRETARY OF LABOR,
Appellant,

vs.

WHIRLPOOL CORPORATION

and

EMPIRE-DETROIT STEEL DIVISION, DETROIT STEEL CORPORATION,
Appellees.

WHIRLPOOL CORPORATION,
Cross-Appellant,

vs.

RAY MARSHALL, SECRETARY OF LABOR,
Cross-Appellee.

Consolidated Appeals from the United States District Courts for the Northern and Southern Districts of Ohio.

Decided and Filed February 22, 1979.

Before: EDWARDS, *Chief Judge;* KEITH and MERRITT, *Circuit Judges.*

KEITH, *Circuit Judge.* This case presents a legal question of great significance to American workers and their employers:

Whether under the Occupational Safety & Health Act of 1970, 29 U. S. C. §§ 651 *et seq.*, the Secretary of Labor may limit the right of an employer to discipline or discharge an employee who refuses to work in the good faith belief that to do so would subject him to danger.

In a carefully circumscribed regulation,[1] the Secretary of Labor (Secretary) has interpreted the Occupational Safety and Health Act's retaliatory discharge provision[2] as protecting an employee who withdraws from danger on the job under certain conditions: The employee's fear must be objectively reasonable, the employee must have sought correction of the dangerous condition and resort to normal OSHA enforcement procedures must be inadequate. Two district courts below ruled that this regulation is invalid because it has no statutory support and because OSHA's legislative history reveals Congressional intent at odds with the regulation. The district courts have sanctioned an employer's right to make workers choose between their jobs and their lives.

We cannot agree that the statute was ever intended to require placing an employee in such an untenable position. Since we find that the Secretary's regulation is consistent with the stated purposes of the Act and its legislative history, and that it represents an appropriate employment of the regulatory power conferred upon the Secretary by the statute, we reverse a ruling to the contrary entered without trial by one District Judge, and remand for further proceedings. As to the other appeal, where the District Judge, after evidentiary hearing, found violation of the regulation but denied relief because of his belief that the

1. 29 C. F. R. § 1977.12, *reprinted in* text, *infra*.

2. 29 U. S. C. § 660(c)(1) provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [OSHA] or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by [OSHA].

regulation was invalid, we also reverse and remand for appropriate remedy.

FACTS

The regulation in question here provides:

> **§ 1977.12 Exercise of any right afforded by the Act.**
>
> (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.
>
> (b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.
>
> (2) However, occasions might arise when an employee is confronted with a choice between not performing as-

signed tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

Pursuant to 29 U. S. C. § 660(c)(2)[3] the Secretary, on behalf of three workers, separately sued defendants Detroit Steel Corporation and Whirlpool Corporation in federal district court for wrongfully retaliating against the workers' exercise of "[a] right afforded by the Act," 29 U. S. C. § 660(c)(1) namely, the right conferred by the regulation, *supra* to withdraw from the risk of serious danger on the job.

In No. 76-2262, *Marshall* v. *Detroit Steel Corp.*, the district court dismissed the Secretary's complaint, ruling that it failed to state a claim upon which relief could be granted. For purposes

3. 29 U. S. C. § 660(c)(2) provides:

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of [29 U. S. C. § 660(c)(1)] may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of [29 U. S. C. § 660(c)(1)] have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of [29 U. S. C. § 660(c)(1)] and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

of this appeal, we must assume that the allegations in the complaint are true and that Detroit Steel violated the regulation. *Conley* v. *Gibson*, 335 U. S. 41, 45-46 (1957). Thus, we are directly faced with the pure issue of whether the Secretary's regulation is valid. In No. 76-2143, *Marshall* v. *Whirlpool Corp.*,[4] the district court also found the regulation to be invalid but only after conducting an evidentiary hearing and concluding that the Secretary's complaint was factually correct: the regulation had been violated. An examination of the facts in that case[5] illustrates that this issue is no mere academic exercise, but literally one of life and death.

The Whirlpool Corporation maintains a manufacturing plant at Marion, Ohio where it produces household appliances. The Marion plant has 13 miles of overhead conveyors which transport appliance components throughout the plant. In order to prevent injury should an appliance component fall from one of the overhead conveyors, the Company installed a huge guard screen approximately 20 feet above the plant floor. The guard screen is suspended over one-third of the total plant floor area. As part of their regular duties, maintenance employees must remove fallen parts from the screen and replace paper spread on the screen to catch grease drippings. In addition the overhead conveyors occasionally need maintenance. In order to perform their duties, maintenance workers must step onto the steel mesh screen itself.

The original steel mesh user 16-gauge panels although starting in 1973 the company began to replace these panels with heavier mesh which could better withstand the stresses imposed

4. Reported as *Usery* v. *Whirlpool Corp.*, 416 F. Supp. 30 (N. D. Ohio 1976).

5. The District Judge's fact finding appears at 416 F. Supp. 30, 32 (N. D. Ohio 1976). In No. 76-2144, the Whirlpool Corporation cross-appeals, claiming that the District Judge's findings of fact were clearly erroneous regardless whether the regulation was valid. Our examination of the record, however, reveals ample support for his conclusion that the employees declined to do their work because they reasonably feared for their lives.

upon it. The questionable safety of the 16-gauge screens is demonstrated by several incidents where workers fell partly through them and at least one incident where a worker fell to the plant floor below but survived. A number of maintenance employees reacted to these "near-misses" by frequently bringing the unsafe screen conditions to the attention of their foremen. Their complaints were to no avail, and on June 28, 1974, a maintenance employee fell to his death through the guard screen in a section where stronger wire mesh had not yet been installed.[6] Although Whirlpool did respond to the fatality by issuing a general order directing maintenance employees to clean guard screens without walking on them and to effectuate some repairs where the screens were weak, two employees who regularly worked on the screens pointed out that many hazardous areas remained. When the company did not respond to their fears regarding these areas, the two employees asked the company safety director to provide them with the local OSHA area office's phone number. The "safety director" gave them the number but made veiled threats that the men should watch what they were doing and took their names and clock numbers.

The night following this incident the two men punched in on their shift and awaited their assignments. They were ordered onto the screens to do their maintenance work. When the men refused, citing the company safety directive saying such work should be done without stepping on the screens, they were peremptorily ordered to the company personnel office, disciplined and issued written reprimands for insubordination.

I

Congress provided in the 1970 Act for measures intended to correct unsafe work place conditions *before* any job refusal over danger or employer retaliatory discipline took place.

6. The employee's death resulted in the company's being cited for violation of OSHA's general duty clause, 29 U. S. C. § 654(a)(1). As of this writing, over four years later, the company's citation is still in administrative litigation.

Under the statute an OSHA inspector issues a citation, followed by mailed notice of proposed penalty. 29 U. S. C. § 659(a). The employer has 15 days in which to contest the penalty. 29 U. S. C. § 659(b). Administrative proceedings are the responsibility of the Occupational Safety & Health Review Commission. 29 U. S. C. § 659(c). *See* 29 U. S. C. § 661. Judicial Review is available in the courts of appeal. 29 U. S. C. § 660.

The Act also provides for special procedures which can be taken when an employee fears that an "imminent danger" exists at the workplace. An employee who fears imminent danger to himself or to fellow employees must notify the Secretary of the danger. If the Secretary is satisfied that the complaint provides reasonable basis to believe that imminent danger exists, an OSHA inspector may enter the workplace. 29 U. S. C. § 657(f)(1). The inspector can cite the employer for a violation, the normal procedure under the Act, 29 U. S. C. § 657(a); if the inspector finds no violation, he must so notify the employees in writing. 29 U. S. C. § 657(f)(1). If the OSHA inspector believes, however, that there exists imminent danger of death or serious physical harm and that the normal enforcement channels are inadequate, the OSHA inspector must recommend to the Secretary that immediate injunctive relief against the dangerous practices or conditions be sought in an applicable federal court. 29 U. S. C. § 662(a), (b), (c). Employees have the right to petition a federal district court for a writ of mandamus against the Secretary if he wrongfully fails to seek injunctive relief. 29 U. S. C. § 662(d).

The lengthy procedure under the statute, then, requires that the Secretary respond to worker's notice, that the OSHA inspector conclude that the danger cannot be prevented through normal enforcement procedures, that the Secretary agree with the inspector's conclusion, and that the federal district court agree to issue the injunction.

Although the Act is designed to protect workers, their role in enforcing the Act is indirect. Employees have the right to

complain to the Secretary about hazardous conditions, and to provide information to the inspector during the investigation. 29 U. S. C. §§ 657(e), (f) (2).

In addition, a worker can petition a federal court for mandamus[7] to order the Secretary to seek an injunction should he decline to do so on recommendation of the inspector. Any retaliation against an employee for exercising these or other statutory right is proscribed by 29 U. S. C. § 660(c)(1). As the Secretary notes in the regulation, there exists no general right to refuse work; even when faced with hazardous conditions, one must complain to the Secretary and wait for the OSHA inspector to arrive.

What does the employee do while waiting for the OSHA inspector to arrive? Or what if an inspector is unavailable? For example, in *Whirlpool*, the disciplining of the employees who refused to work out of fear for their lives took place at 11:00 at night. Under the Secretary's regulation the question as to whether an OSHA inspector was readily available at that hour would become an issue of fact for the District Judge. Where an employee reasonably fears that he is in imminent danger and alternative relief is unavailable, the regulation allows him to refuse to perform that hazardous work and provides a subsequent due process remedy if there is retaliation from the employer. We must examine whether this regulation can be properly implied from the Act.

II

Our question is whether the legislative history of this Act, its stated purposes and its allocation to the Secretary of power to implement its purposes by regulation serve to validate the regulation quoted above.

7. Since the writ of mandamus has been abolished in federal practice, F. R. Civ. Pro. 81(b), the Act presumably contemplates injunctive relief against the Secretary. *See* Oldham, OSHA May Not Work in 'Imminent Danger' Cases, 60 A. B. A. J. 690 (1974).

The statute itself spells out its purposes:

> **§ .651. Congressional statement of findings and declaration of purpose and policy**
>
> (a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
>
> (b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—
>
> (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;
>
> (2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;
>
> (3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory function under this chapter;

The statute itself delegates broad power to adopt regulations to implement the purposes of the Act:

> (2) The Secretary and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this chapter, including rules and

regulations dealing with the inspection of an employer's establishment.

29 U. S. C. § 657(g)(2).

The statute itself prohibits employee discharge or discrimination for the exercise of "any right afforded by this chapter":

> **Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief**
>
> (c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

29 U. S. C. § 660(c)(1) (1976).

We conclude that the regulation is a reasonable exercise of the Secretary's authority. As a rule, administrative regulation properly promulgated under statutory authority are presumed valid, *Grubbs* v. *Butts*, 514 F. 2d 1323 (D. C. Cir. 1975); *United States* v. *Boyd*, 491 F. 2d 1163 (9th Cir. 1973). An administrative officer exercising rule making powers delegated to him by Congress may adopt regulations so long as they are reasonable and consistent with the intention of Congress as expressed by the statute. *See United States* v. *Larrionoff*, 431 U. S. 864 (1977); *Manhattan General Equipment Co.* v. *CIR*, 297 U. S. 129 (1936). This deference which we must give to the Secretary's regulations is such that "we need not find that the construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965) *quoting Unemployment Commission* v. *Aragon*, 329 U. S. 143 (1924).

Under *Lilly* v. *Grand Trunk Ry. Co.*, 317 U. S. 481 (1943), it has been axiomatic in federal practice that a statute which

is remedial, intended to protect worker safety, must be given a liberal construction.

> "Since the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a 'narrow or limited construction is to be eschewed.' *St. Marys Sewer Pipe Co.* v. *Director of United States Bureau of Mines*, 262 F.2d 378, 381 (3d Cir. 1959). Rather, this court must interpret the Act liberally in light of its primary purpose."

Rushton Mining Co. v. *Morton*, 520 F. 2d 716, 720 (3d Cir. 1975), *citing Freeman Coal Mining Co.* v. *Interior Bd. of Mine Op. Appeals*, 504 F.2d 741, 744 (7th Cir. 1974). *See also Swinson* v. *Chicago, St. Paul, M. & O. Ry.*, 294 U. S. 529 (1935). Cf. *United States* v. *American Trucking Assns.*, 310 U. S. 534 (1940) (Statutes are to be construed to effectuate Congress' intent).

One need look no further than the Occupational Safety and Health Act's Statement of Purpose, 29 U. S. C. § 651(b), to find the strong remedial basis of this legislation. It is:

> "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions *and to preserve our human resources*"—(emphasis added).

Furthermore, under the Act every employer must "furnish to each of his employees, employment and a place of employment which are free from recognized hazards that are causing, or are likely to cause death or serious physical harm to his employees." 29 U. S. C. § 654. This clause imposed a duty upon employers to furnish a workplace free from recognized deadly hazards.[8] *See Empire Detroit Steel v. O. S. H. R. C.*, 579 F. 2d 378 (6th Cir. 1978); *Brennan* v. *Winters Battery Manuf. Co.*, 531 F. 2d 317 (6th Cir. 1975), *cert. denied*, 425 U. S. 991 (1976).

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8. We additionally note that employees are under a duty to comply with safety and health standards under the Act. 29 U. S. C. § 654(b). In theory, an employee could be cited for continuing to work under hazardous conditions!

That the Act is remedial and has thus been broadly construed by the courts[9] is of great relevance to this inquiry. 29 U. S. C. § 660(c)(1)'s requirement that employers not retaliate against complaining employees should be read broadly, otherwise the Act would be gutted by employer intimidation. Congress was aware of the shortage of federal and state occupational safety inspectors, and placed great reliance on employee assistance in enforcing the Act.[10] Furthermore, it is clear that without employee cooperation, even an army of inspectors could not keep America's work places safe.

Safety and profit are sometimes mutually exclusive. *See Godwin* v. *OSHRC*, 540 F. 2d 1013, 1016 (9th Cir. 1976). In the words of the D. C. Circuit: "Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present." *Phillips* v. *Interior Bd. of Mine Operations Appeals*, 500 F. 2d 722, 778 (D. C. Cir. 1974), *cert. denied*, 420 U. S. 938 (1975).[11]

9. *See, e.g. Baltimore & Ohio R. Co.* v. *O. S. H. R. C.*, 548 F. 2d 1052 (D. C. Cir. 1976).

10. *See* S. Rep. No. 91-1282, 91st Cong. 2d Sess. 11-12, 21 *reprinted in* Subcommittee on Labor, the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print June 1971) [hereinafter cited as Legislative History] at 151-52, 161 and *reprinted in* 1970 U. S. Code Cong. & Admin. News pp. 5177, 5188-89, 5198; H. Rep. No. 91-1291, 91st Cong., 2d Sess., 22, 31, *reprinted in* Legislative History at 852, 861; 116 Cong. Rec. 36530, *reprinted in* Legislative History at 399 (Sen. Saxbe).

11. The regulation does not affect the vast majority of responsible employers who would never consider forcing workers to labor under imminently hazardous conditions. Only a handful of irresponsible employers are affected and the regulation may benefit them. If death or injury occurs on the job, the employer faces potential liability under OSHA or state health and safety codes. Indeed, a wilful violation of OSHA which results in death to an employee may subject an employer to criminal prosecution. 29 U. S. C. § 666(e). And since state workmen's compensation statutes are experience-based, the employer would end up paying in the long run as well. *See, e.g.* Ohio Rev. Code §§ 4123.29, 4123.34; *State ex rel. The Zone Cab Corp.* v. *Industrial Comm. of Ohio*, 132 Ohio State 156, 5 N. E. 2d 477 (1936).

Further, to invalidate the regulation would lead to absurd results. Consider the following cases:

1) Employee is faced with imminent hazard on the job. He leaves the job to telephone the local OSHA office and request an immediate inspection. The employer cannot lawfully discharge the employee.

2) Employee is faced with an imminent hazard on the job. He goes to a telephone, but is unable to reach an OSHA inspector, (or there is no telephone available). The worker goes to his car and personally locates an inspector. The worker and the inspector return to the job site. The employer cannot lawfully discharge the employee.

3) Employee is faced with an imminent hazard on the job. He telephones an OSHA inspector, but refuses to subject himself to the perceived hazard until the inspector arrives. Apparently, the employer is free to discharge the employee.

4) Employee is faced with an imminent hazard on the job. He is unable to reach an OSHA inspector by telephone, and has no automobile available to personally look for one (or nearest OSHA inspector is 100 miles away). Instead of conducting a futile quest on foot, the employee resolves to withdraw from the danger and try to locate an inspector later. Apparently, the employer is free to discharge the employee.

These illustrations demonstrate the reason for the Secretary's regulation. The knowledgeable employee who withdraws from the imminent job hazard and immediately take steps to locate an inspector is protected from retaliation. Yet, absent the regulation's protection, the employee who withdraws from the danger but reasonably waits, or must wait, to summon an inspector or for one to arrive, can be fired without recourse—no matter what hazard he faced. The outcome should not hinge

on whether an employee knows enough to keep within OSHA's protections by making obvious efforts to find an OSHA inspector immediately.

In sum, the need to give broad construction to a retaliatory discharge prohibition clause such as § 660(c)(1) is apparent. To do otherwise is to lay a trap for the unwary employee and to strip the employee of vital protection under a statute meant to safeguard him. We should not construe the Act to permit an employer to, in effect, chain a worker to his post under dangerous conditions until the Secretary can take action. To allow this to happen is to allow disasterous results to both employees and employers.

It is significant that other remedial acts passed by Congress contain similar provisions protecting employees against retaliation. These include: The National Labor Relations Act,[12] the Coal Mine Safety and Health Act,[13] Title VII of the Civil

12. 20 U. S. C. § 158 provides:

(a) It shall be an unfair labor practice for an employer—

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act].

13. 30 U. S. C. provided:

(b)(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

That section was amended by the Federal Mine Safety and Health Amendments of 1977. Now codified at 30 U. S. C. § 815, it provides:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter

(Footnote continued on next page.)

Rights Act of 1964,[14] and the Fair Labor Standards Act.[15]

These provisions have been given a liberal construction by the courts. In *NLRB* v. *Scrivener*, 405 U. S. 117 (1972), the Court held that workers who give written sworn statements to NLRB field offices were protected under the NLRA although the statute[16] spoke only of protection for filing charges or

(Footnote continued from preceding page.)

because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or, has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

14. 42 U. S. C. § 2000e-3 provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [Act].

15. 29 U. S. C. § 215(a) provides:

. . . it shall be unlawful for any person—

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

16. *See* fn. 12, *supra*.

giving testimony. The statute prohibited employers from "otherwise" discriminating against the exercise of a protected right. This language, coupled with the Act's remedial purpose was sufficient for the Court to grant protection.[17] Similarly, in *Smith* v. *Columbus Metropolitan Housing Authority*, 433 F. Supp. 61 (S. D. Ohio 1977), Judge Duncan broadly construed Title VII's retaliatory conduct prohibitions broadly to protect an otherwise uninvolved employee who refused to cooperate with an employer who was defending discrimination charges filed by discharged Black workers. *See also Rutherford* v. *American Bank of Commerce*, 565 F. 2d 1162 (10th Cir. 1977); *EEOC* v. *Kalir*, 401 F. Supp. 66 (S. D. N. Y. 1975). In *Dunlop* v. *Carriage Carpet Co.*, 548 F. 2d 139 (6th Cir. 1977), this court broadly construed the Fair Labor Standards Act to protect a *former* employee from retaliation, although the statute, on its face, protected only employees. Judge Phillips' opinion for the court concluded with a statement which is equally applicable here:

> To hold otherwise would do violence to the Congressional intent and purposes of the Act and would prejudice the effective enforcement of the Act.

Id. at 147.

Especially analogous is judicial construction of the Coal Mine Health & Safety Act of 1970. In *Phillips* v. *Interior Board of Mine Operations Appeals*, 500 F. 2d 772 (D. C. Cir. 1974), *cert. denied*, 420 U. S. 938 (1975), the court construed that Act to protect an employee who had complained about safety violations to his foreman and was fired for refusing to work under hazardous circumstances. The court reasoned that the employee's conduct was an implied initial step in the

17. This Court's decision in *Hoover Design Corp.* v. *NLRB*, 402 F. 2d 987 (6th Cir. 1968), which narrowly construed § 8(a)(4) of the NLRA cannot survive *Scrivener. See NLRB* v. *Retail Store Emp. U., Local 876*, 570 F. 2d 586, 591 n. 5 (6th Cir. 1978).

complaint process, deserving of protection.[18] The Act's language at the time was similar to OSHA's provision here.[19] *See also Munsey* v. *Morton*, 507 F. 2d 1201 (D. C. Cir. 1974) (remanding to Interior Board of Mine Operations Appeals for reconsideration in light of *Phillips*).

When Congress passed the Federal Mine Safety and Health Amendments of 1977, 30 U. S. C. §§ 801 *et seq.* it amended the statute's retaliatory discharge provisions.[20] The Senate Report stated that it was Congress' wish "to insure the continuing vitality of the various judicial interpretations of [the retaliatory discharge provision] of the Coal Act which are consistent with the broad protection of the bill's provisions . . ." S. Rep. No. 91-181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* 1977 U. S. Code, Cong'l & Admin. News p. 36. The two cases specifically cited with approval by the Committee were *Phillips* and *Munsey*. *Id.*

We note that OSHA specifically protects an employee's exercise of "any right afforded by this [Act]." A right to a hazard-free work place is implicit throughout the Act, and specifically contained in the Act's statement of purpose, *supra*. It is of some significance that the other statutes referred to, *supra*, contain no similar broad language.[21] The above precedents compel that we broadly construe "any right" to include the right to refuse to work in the face of deadly peril under the circumstances outlined in the Secretary's regulation.

18. It is true that the mining company had established a safety complaint procedure the first step of which was for a worker to bring a complaint to the attention of a foreman. The *Phillips*' court took particular notice of this and found resort to the procedure to be protected. *Id.* at 779-81. There is no reason to accord lesser protection to employees of companies without such formal procedures.

19. *See* fn. 13, *supra*.

20. *See* fn. 13, *supra*.

21. The recently amended Coal Mine Safety & Health Act does contain similar broad language. However, at the time of the D. C. Circuit's opinions in *Phillips* and *Munsey*, that Act contained no such language. *See* fn. 13, *supra*. In addition, the Farm Labor Contractor Registration Act also contains similar language. *See* 7 U. S. C. § 2050(a).

We would be free on our own to reach the result of permitting an employee to withdraw from danger, as did the D. C. Circuit in *Phillips* v. *Interior Bd. of Mine Operations Appeals, supra.* Indeed, the situation here is analogous to that in a series of cases which imply civil causes of action from statutes which otherwise do not provide for a specific civil remedy.[22] Here, however, all that we must do is pay traditional deference to the Secretary's rule-making authority. We have no difficulty doing so.

22. It is true that this Circuit has held in *Russell* v. *Bartley,* 494 F. 2d 334 (6th Cir. 1974), that no private cause of action arises from the Occupational Safety and Health Act. *Russell* is in accord with the view of other courts that both the express provisions of the Act (*see* 29 U. S. C. § 653(b)(4)) as well as the overall enforcement scheme (the Secretary of Labor bringing suits on behalf of aggrieved employees) indicated that Congress meant that no private cause of action for damages should arise. *See e.g. Skidmore* v. *Travelers Ins. Co.,* 356 F. Supp. 670 (E. D. La.), *aff'd* 483 F. 2d 67 (5th Cir. 1973).

The policy factors which underly cases allowing implied causes of action are applicable here, however. "It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 (1964).

The general rule to be applied was well stated by Judge Learned Hand in *Reitmeister* v. *Reitmeister,* 162 F. 2d 691, 694 (2d Cir. 1947), when he implied a private cause of action arising from a violation of § 605 of the Federal Communications Act:

> Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal.

Especially relevant is *Wyandotte Co.* v. *United States,* 389 U. S. 191 (1967), where the Court implied a civil remedy because the criminal remedy expressly authorized by the statute was inadequate to ensure the statute's effectiveness. 389 U. S. at 202. Of course, a court will not imply remedies from a statute under all circumstances. *Cort* v. *Ash,* 422 U. S. 66 (1975), and *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U. S. 453 (1974), indicate that no remedy will be implied if the statute was not designed to protect the class seeking the particular remedy, or if the remedy would be inconsistent with the overall scheme of the statute, or if the remedy is unnecessary to effectuate the Congressional policy underlying the statute. None of these factors is present here.

The Secretary has promulgated a regulation which is in no way inconsistent with the Act's purposes or the statutory scheme. On the contrary, as indicated above, the regulation performs a vital function in rounding out the Act's enforcement provisions. In sum, other things being equal, this regulation must be upheld in light of the deference given administrative interpretations of statutes, the broad reading traditionally given remedial statutes and the broad policy factors which underlie the regulation.[23]

23. This Court requested the parties to brief the question of what additional common law or statutory protections existed in favor of employees who refused to work for fear of their safety. We conclude that other protections are inadequate and that the Secretary's regulation is entirely consistent with what other protections do exist.

Common law tort remedies are extremely limited, at best an employee can sue for on the job injuries after the injury occurs. *See* Prosser on Torts § 80 (4th ed. 1971). Although there have been some recent changes, courts are reluctant to limit an employer's contractual right to discharge an employee. *See Percival* v. *General Motors Corp.,* 539 F. 2d 1126 (8th Cir. 1976). The Oregon Supreme Court has held that although it would be willing to extend common-law protection to employees who complain about safety, there was no need to do so because of OSHA! *Walsh* v. *Consolidated Freightways, Inc.,* 278 Or. 347, 563 P. 2d 1205 (1977). We cannot abdicate our responsibilities under OSHA in the hope that state courts will extend needed protection to workers.

As indicated above, workers do have protection under § 7 of the N. L. R. A. That statute has gaps, however, which OSHA does not have. The N. L. R. A. does not protect agricultural workers or supervisors. *See* 29 U. S. C. § 152(3). Small employers are exempt because the N. L. R. B. does not choose to exercise jurisdiction over them. *See Siemons Mailing Service,* 122 N. L. R. B. 81 (1958). The Secretary's well-drafted supplemental brief cites estimates that the N. L. R. A. covers 44 million employees and OSHA 64 million. Supp. Memorandum at 11.

Additionally, if a solitary employee withdraws from a work hazard, there is doubt that he will be protected under the N. L. R. A. The N. L. R. B. has squarely found protected activity where a solitary employee complains about work safety and files a complaint with OSHA. *Jim Causley Pontiac,* 232 N. L. R. B. No. 37 (1977); *B&P Motor Express, Inc.,* 230 N. L. R. B. No. 96 (1977); *Alleluia Cushion Co.,* 221 N. L. R. B. 999 (1975). The "implied concert" theory on which these decisions are based, however, has received a cold reception in some Courts of Appeal. *See N. L. R. B.* v. *C. & I. Air Conditioning,* 486 F. 2d 977 (9th Cir. 1973); *N. L. R. B.* v.

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III.

Defendants, however, argue that all things are not equal, because the legislative history is clear that Congress did not mean to extend to employees the rights given to them by the regulation. It is to this question that we must now turn.

The district courts below ruled, and the corporate defendants maintain, that the Act's legislative history evidences clear intent by Congress that employees not be allowed to walk off the job when faced with a dangerous situation. It is undisputed that the regulation which the Secretary has enacted was never directly addressed by Congress. The critical issue to be discussed, therefore, is whether we can infer from the Occupational Safety and Health Act's legislative history a specific Congressional will which is irreconcilable with the Secretary's regulation here.

Defendants seek to make this showing by pointing to two events which took place while Congress was considering the Act: 1) Congressional rejection of an ill-fated House bill which would have allowed employees subject to certain toxic substances on the job to withdraw and still be paid; 2) Congressional rejection of administrative shut down proposals. Defendants state that these events amount to an implicit declaration by Congress that the regulation in question cannot stand.

We begin our study of the legislative history of the Occupational Safety and Health Act with the so-called Daniels Bill,

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Northern Metal Co., 440 F. 2d 881 (5th Cir. 1971). *Compare N. L. R. B.* v. *Brown*, 546 F. 2d 690 (6th Cir. 1976).

It is clear, moreover, that the remedies afforded a discharged employee under OSHA and the N. L. R. B. are coextensive. The *Alleluia Cushion Co.*, line of cases, *supra*, demonstrates that no clash exists between them.

See generally Ashford & Katz, Unsafe Working Conditions: Employee Rights under the Labor Management Relations Act and the Occupational Safety & Health Act, 52 Notre Dame Lawyer 802 (1977).

H. R. 16785 (1970),[24] which was reported out of the House Education and Labor Committee. The Daniels Bill contained a subsection, 19(a)(5), which allowed employees to absent themselves from their job, with pay, when exposed to substances which had a potentially toxic or harmful effect when found or used at certain levels in the work place, unless their employer provided appropriate warning labels and protective equipment which allowed them to carry out their work without being harmed.[25] Opponents of the Bill attacked this subsection as

24. For text of this bill, *see* Legislative History at 721.

Four bills had been originally introduced in the House of Representatives in 1969; The Administration bill (H. R. 13373), *reprinted in* Legislative History at 679, Representative Hathaway's bill (H. R. 843), *reprinted in* Legislative History at 599, Representative O'Hara's bill (H. R. 3809), *reprinted in* Legislative History at 629; and Representative Perkins' bill (H. R. 4294), *reprinted* in Legislative History at 659.

H. R. 16785 (1970), Representative Daniels' bill, was introduced on April 7, 1970, and emerged from the House Education and Labor Committee three months later. This bill was supported by organized labor. Thwarted in committee, congressmen opposed to the bill rallied around H. R. 19200 (1970), *reprinted in* Legislative History at 763, which was introduced in September of 1970 as an alternative to the Daniels' bill.

25. This section provided:

> "The Secretary of Health, Education and Welfare shall publish within six months of enactment of this Act and thereafter as needed, but at least annually, a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potential toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substances designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions

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guaranteeing workers the right to "strike with pay," a label which proved to be its downfall. Unhappy with this and other provisions in the Daniels Bill, Congressman Steiger of Wisconsin introduced a substitute bill on the floor of the House which *inter alia* did not contain a "strike with pay" provision. *See* H. R. 19200 (1970), *reprinted in* Legislative History at 763.

Confronted with strong opposition on a variety of grounds,[26] Congressman Daniels responded, *inter alia*, by offering to delete

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and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period." H. R. 16785 § 19(a), (1970), *reprinted in* Legislative History at 755-56, and *reprinted in* H. Rep. No. 91-1291, 91st Cong., 2d Sess. 12 (1970), *reprinted in* Legislative History at 842.

The Committee's accompanying report provides an explanation for this provision:

> "Because any workable solution to covering new [toxic] substances would have to be fast-acting and self-enforcing, the Committee adapted a two-step process whereby workers or employers could submit unknown substances to the Department of Health, Education and Welfare for a determination of their toxicity. Only after the Department of Health, Education and Welfare made a determination that a substance was toxic would employees have a right to information about these substances or a right to necessary protective equipment, if any. To assure these rights, the bill guarantees that employees may not be forced to work without these safeguards. There is still a real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay. However, the Committee intends that the danger cannot be deliberately caused by the employee. The Department of Labor will implement this intent. Nothing herein restricts the right of the employer, except as he is obligated under other agreements, to assign a worker to other non-prohibited work during this time. This should eliminate possible abuse by allowing the employer to avoid payment for work not performed." H. Rep. No. 91-1291, 91st Cong., 2d Sess. 29-30 (1970), *reprinted in* Legislative History at 859-860.

26. It must be emphasized that the controversy over which Occupational Safety and Health bill to enact did not center on the "strike

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his bill's alleged "strike with pay" provision and offering to substitute a provision giving employees the right to request that the Secretary immediately inspect the premises.[27] He explained:

> The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk or harm; instead, we have this amendment which enables employees subject to a risk of harm to

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with pay" provision. An examination of the legislative history reveals that the principal opposition of republicans to the labor-supported bills which emerged from Committee in both the Senate and the House concerned: 1) Which agency was to set health and safety standards, 2) Whether an independent adjudicatory body should be established to administratively review violations, 3) Whether employers should be subject to a general requirement to provide a safe and healthful work environment, 4) Whether the Secretary of Labor should have authority to order administrative shutdowns in cases of imminent danger (discussed *infra*).

See, e.g., H. Rep. No. 91-1291, 91st Cong., 2d Sess. 47-60 (1970), *reprinted in* Legislative History at 877-890; S. Rep. No. 91-1282, 91st Cong., 2d Sess. 54-64 (1970), *reprinted in* Legislative History at 193-203 and *reprinted in* 1970 U. S. Code, Cong'l & Admin. News pp. 5218-5227.

27. The proposed addition provided:

> Any employees or representative of employees who believe that a violation or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear on any record published, released, or made available pursuant to this Act. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violations or danger exist. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify in writing the employees or representative of the employees of such determination."

116. Cong. Rec. 23645 *reprinted in* Legislative History at 1008.

> get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm.

116 Cong. Record, 38377-78 (1970), *reprinted in* Legislative History at 1009. *See also* 116 Congressional Record 38369 (1970), *reprinted in* Legislative History at 986 (Congressman Perkins); 116 Congressional Record 38376 (1970), *reprinted in* Legislative History at 1005 (Congressman Daniels).

Notwithstanding Representative Daniels' efforts to make his bill more palatable,[28] the House voted it down[29] and instead passed the alternative Steiger bill. That bill said nothing about employees walking off the job, but allowed the Secretary to obtain temporary restraining orders from a Federal Court to enjoin imminent dangers in a workplace. If the Secretary unreasonably failed to seek this relief, an employee who was injured as a result could sue the United States in the Court of Claims.[30]

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28. The Secretary also argues that because Representative Daniels amended his bill to remove the alleged "strike with pay" language, the vote between his bill and the Steiger bill was one in which *neither* bill had any provision concerning this issue. Br. for the Sec'y at 30 n. 13. The legislative history, however, is clear that Representative Daniels' proposed amendments were never acted upon and that it was his original bill which was voted down in favor of the Steiger bill. *See* 116 Cong. Rec. 38369-70 (1970), *reprinted in* Legislative History at 985-986 (Congressman Perkins); 116 Cong. Rec. 38375-78, *reprinted in* Legislative History at 1006-1010 (Congressman Daniels); 116 Cong. Rec. 38704-05, *reprinted in* Legislative History at 1064 (Congressman Perkins); 116 Cong. Rec. 38705, *reprinted in* Legislative History at 1065 (Congressman Daniels); 116 Cong. Rec. 38707, *reprinted in* Legislative History at 1072 (Congressman O'Hara); 116 Cong. Rec. 38714, *reprinted in* Legislative History at 1089 (Congressman Horton).

29. *See* 116 Cong. Rec. 38723, *reprinted in* Legislative History at 1112-15.

30. In relevant part, the bill provided:

> SEC. 12. (a) The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any

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Action in the Senate began with the reporting out of Committee of the Williams Occupational Safety and Health Bill.[31] The Williams Bill did not contain a "strike with pay" provision. However, it did provide that in imminent danger situations, an employee had the right to make a written request for an immedi-

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> conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.
>
> (b) Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to section 11 of this Act. The proceeding shall be as provided by Rule 65 of the Federal Rules, Civil Procedure, except that no temporary restraining order issued without notice shall be effective for a period longer than five days.
>
> (c) Whenever and as soon as an inspector concludes that conditions or practices described in subsection (a) exist in any place of employment, he shall inform the affected employees and employers of the danger and that he is recommending to the Secretary that relief be sought.
>
> (d) If the Secretary unreasonably fails to petition the court for appropriate relief under this section and any employee is injured thereby either physically or financially by reason of such failure on the part of the Secretary, such employee may bring an action against the United States in the Court of Claims in which he may recover the damages he has sustained, including reasonable court costs and attorney's fees.
>
> (e) In any case where a temporary restraining order is obtained under this section by the Secretary, the court which grants such relief shall set a sum which it deems proper for the payment of such costs, damages, and attorney's fees as may be incurred or suffered by any employer who is found to have been wrongfully restrained or enjoined. In no case shall any employer wrongfully restrained or enjoined be entitled to a recovery for costs, damages, and attorney's fees in excess of the sum set by the court.

H. R. 19200, 91st Cong. 2d Sess. (1970), *reprinted in* Legislative History at 796-798, 1101-1102. *Contrast* Congressman Daniels proposed amendment, *supra* at fn. 27.

31. S. 2193 (1970), *reprinted in* Legislative History at 204.

ate inspection.[32] Although the Williams bill had some controversial provisions,[33] it survived intact and passed the Senate.

In House-Senate Conference, the Senate was largely successful in retaining the provisions of the Williams bill. In particular, the Senate's provision, giving employees the additional right to contact the Secretary and to get an inspector on the scene at once was acceded to by the House.[34] Conference Report No. 91-1765, *reprinted in* Legislative History at 1154, 1164-65; 1190-1191 and *reprinted in* 1970 U. S. Code Cong'l and Admin. News

32. In relevant part, the Williams' bill provided:

"Any employees or representatives of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, and shall set with reasonable particularity the grounds for the notice, and shall be signed by the employees or representatives of employees, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear on any records, published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification, the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violations or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists, he shall notify in writing the employees or representative of the employees of such determination." S. 2193 § 8(f)(1), (1970), *reprinted in* Legislative History at 252-253.

33. Opposition centered around the bill's provisions setting standard-making and adjudication in the Secretary of Labor and the bill's authorization of administrative shutdowns. S. 2193 §§ 6, 10c, 11 (1970). The controversy is fully aired in the Senate Report, S. Rep. No. 91-1282, 91st Cong., 2d Sess. 54-64 (1970), *reprinted in* Legislative History at 193-203 and *reprinted in* 1970 U. S. Code, Cong'l & Admin. News pp. 5218-5227. *See generally* the debate on the Senate Floor on October 14 and November 16, 17, 1970, *reprinted in* Legislative History at 407-528.

34. As noted above, *see* fn. 27 and accompanying text, in response to opposition to the so-called "strike with pay" provision, Representative Daniels also offered an amendment to his bill which would have given employees subject to imminent danger the right to summon an OSHA inspector into the situation promptly.

5228, 5334. The Act as finally adopted incorporates this compromise. 29 U. S. C. § 657(f).

Defendants would have us characterize this series of events as indicating a specific determination by Congress that employees did not have the right to walk out, but instead had only the right to bring the Secretary on the scene to investigate an allegedly imminently hazardous situation. We disagree. Initially, we note that the "strike with pay provision" of the original Daniels Bill in the House, was quite different from the regulation here in question. The proposal in Congressman Daniels' bill dealt with the problems of increasing concentrations of toxic substances, not immediate hazards of all kinds to both health and safety. The walk-off-the-job provision in that bill did not require an imminent threat to life, and required sixty days of employer inaction and a certification by the Secretary that the substance in question was indeed toxic. This curiously circumscribed provision was quickly saddled with the sobriquet "strike with pay."

Crucial to an understanding of Congressional opposition is the term "with pay." As the Court noted in *Usury* v. *Babcock and Wilcox Co.*, 424 F. Supp. 753, 756 (E. D. Mich. 1976), it is obvious that Congress' concern was specifically aimed against workers walking off the job with pay. No mention whatever was made of workers' rights' to refuse to perform dangerous work assignments without pay. The very fact that the section was misentitled "strike with pay" and was constantly referred to as such[35] is the clearest indication possible that Congress was

35. We consider it significant that *every time* that the question of employees walking off the job was addressed, it was always in the "with-pay" context. Senator Williams stated that ". . . the committee bill does not contain a so-called strike-*with-pay* provision," because of the "possibility for endless disputes over whether employees were entitled to walk off the job *with full pay* . . ." 116 Cong. Rec. 37326, *reprinted in* Legislative History at 416. Representative Perkins spoke on the House floor of the offer to delete "[t]he provision that would have permitted an employee to absent himself from exposure to a toxic substance *without loss of pay*, the so-called *'strike with pay'* provision . . ." 116 Cong. Rec. 38369, *reprinted in* Legislative

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specifically concerned with the monetary incentive that workers would have by claiming that they believed a situation was hazardous and then sitting back and collecting their paychecks for doing nothing.

It is easy to understand why Congressman Daniels stated that this provision had been "misunderstood" and why he offered to drop it. There is no indication that this provision was ever viewed as the equivalent of the regulation which here allows the worker to protect himself from imminent danger to both health and safety.

Defendant Detroit Steel finds it significant that Representative Daniels' proposed amendments to his bill would have both deleted the so-called "strike with pay" provision and substituted in its place a provision giving employees subject to an imminent danger the right to summon an OSHA inspector into the plant at once. Since Representative Daniels' proposed amendment was

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History at 986. Representative Daniels initially stated that ". . . the provision in the committee bill which has been frequently misinterpreted as a *'strike with pay'* provision has also been deleted." 116 Cong. Rec. 38376, *reprinted in* Legislative History at 1005. He subsequently explained that this provision would have permitted "employees to absent themselves from dangerous situations *without loss of pay*." 116 Cong. Rec. 38378, *reprinted in* Legislative History at 1009. He further went on to state that "the provision on employees *not losing pay* was so generally misunderstood that we have decided to drop it. We have no provisions *for payment* of employees who want to abstain themselves from risk of harm." 116 Cong. Rec. 38378, *reprinted in* Legislative History at 1009.

There were four other references to the provision in the legislative history, Representatives Randall, Feigham and Horton echoed: "The provision that has been attacked as giving employee [sic] the right to *'strike with pay'* will be deleted." 116 Cong. Rec. 38378, 38390, 38714, *reprinted in* Legislative History at 101, 1046, 1089. Also, Representative Daniels additionally stated in later argument on the House floor "[w]e have deleted a provision which was—though inaccurately—called a 'strike *with pay*' provision and have provided that employees may request an inspection when they are subjected to dangers at the work-place." The above references clearly demonstrate Congress' preoccupation with paying people to walk off the job. (emphasis supplied throughout).

never acted upon,[36] we decline to accord significance to this event. Even granting Detroit Steel's argument, there is no indication that Congressman Daniels, or Congress, contemplated the problem which the regulation addresses.

It is established law that employees have the right to strike in this country. Employees are specifically permitted to walk off the job without reprisal under Federal Labor Law in two instances.[37] First, where such conduct can be deemed concerted activity under § 7 of the National Labor Relations Act, 29 U. S. C. § 157. *See N. L. R. B.* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962); *N. L. R. B.* v. *Leslie Metal Arts Co.*, 509 F. 2d 811 (6th Cir. 1975); *N. L. R. B.* v. *KDI Precision Products Inc.*, 436 F. 2d 385 (6th Cir. 1971). *See also Eastex, Inc.* v. *N. L. R. B.*, 46 U. S. L. W. 4783 (U. S. June 20, 1978). Second, where there exists a collective bargaining agreement prohibiting strikes and mandating arbitration of grievances, refusal of employees to work under hazardous conditions is not an illegal strike. § 502 of the Taft-Hartley Act, 29 U. S. C. § 143. *See N. L. R. B.* v. *Knight Morley Corp.*, 251 F. 2d 753, (6th Cir.), *cert. denied*, 357 U. S. 927 (1957), Cf. *Gateway Coal Co.* v. *UMW*, 414 U. S. 368 (1974), (standard to be used is objective); *Plain Dealer Publishing Co.* v. *Cleveland Typo Union #53*, 520 F. 2d 1220, 1229 (6th Cir. 1975) (adopting district court opinion) (applying objective standard and finding legitimate fear of violence prevented employees from crossing picket lines).

Congress was well aware that workers covered by the National Labor Relations Act possessed the right to strike over unsafe working conditions.[38] It is only when one adds the additional element of being paid to strike that Congressional opposition

36. *See* fn. 28, *supra.*

37. *See also* fn. 23, *supra.*

38. Indeed, explicit reference to this was made on the House floor. 116 Cong. Rec. 422 (1970), *reprinted in* Legislative History at 1223-24 (Rep. Sherle).

comes into focus.[39] This is apparent from Senator Williams' statement when he introduced his bill on the Senate Floor:

> "I should also add, despite some widespread contentions to the contrary, that the Committee bill does not contain a so-called strike *with pay* provision. Rather than raising a possibility for endless disputes whether employees were entitled to walk off the job *with full pay*, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection." (Emphasis added).

116 Cong. Rec. 37326, *reprinted in* Legislative History at 416. Senator Williams was not concerned over whether employees could walk off the job in the face of hazardous working conditions; his concern was clearly directed to the added incentive of full pay.

The second aspect of the legislative history which defendants urge in support of their position surrounds the legislative evolution of the "imminent danger" provisions of the Act, 29 U. S. C. § 662. In the House, the original Daniels' bill allowed OSHA inspectors to issue administrative orders for up to five days which would "prohibit the employment or presence of any individuals in locations or under conditions where such imminent danger exists, except to correct or remove it." H. R. 16785, 91st Cong., 2d Sess. § 23(a) (1970), *reprinted in* Legislative History 893, 955-56. *See also* the accompanying Committee report H. R. No. 11291, 91st Cong'l 2d Sess., 25 (1970), *reprinted* in Legislative History at 855. (provision modeled after the principles of the New York State Health and Safety Code). United States District Courts, upon application by the Secretary, had the authority to enjoin business operations for greater periods of time. *Id.* The alternative Steiger bill gave the courts exclusive

39. Compare the "political hot potato" of whether a state can pay unemployment benefits to striking workers. *See New York Tel Co.* v. *New York State Dept. of Labor,* 566 F. 2d 388, 394 (2d Cir. 1977), *cert. granted,* ..... U. S. ..... (1978).

authority to enjoin violations, upon application of the Secretary.[40] H. R. 19200, 92nd Cong., 2d Sess. § 12 (1970), *reprinted in* Legislative History at 796-98. As noted, it was this latter bill which the House adopted.

The Williams Bill in the Senate contained an imminent danger provision which authorized an OSHA inspector under certain circumstances, to issue an order restraining an employer's business operations for up to 72 hours.[41] This authority could only be exercised if the Secretary had insufficient time to get a court ordered injunction and the Secretary was required to provide certain review procedures to help minimize arbitrary abuse.[42]

When the Senate bill (the Williams bill) and the House bill (the Steiger bill) were submitted to a conference committee, the Senate receded from its provision permitting OSHA inspectors to issue 72 hour administrative restraining orders.[43]

40. In additional response to the Steiger Bill, Representative Daniels also offered to amend his bill to "rely exclusively on judicial remedies to counteract these imminent dangers. Our provision is now identical to that in the Steiger substitute." 116 Cong. Rec. 38376, *reprinted in* Legislative History at 1005.

41. S. 2193 § 12 (1970), *reprinted in* Legislative History at 561-64. *See* S. Rep. No. 91-1282, 91st Cong., 2d Sess. 12-13 (1970), *reprinted in* Legislative History at 152-53, *and reprinted in* 1970 U. S. Code Cong'l and Admin. News pp. 5819-90.

42. The drastic administrative shut down provisions in the original Williams bill, S. 2193, 91st Cong., 1st Sess., § 6(a)(2) (1969), *reprinted in* Legislative History at 1, 12-13, were modified in committee to a 72-hour maximum period and required concurrence by a regional Labor Department official. S. 2193, 91st Cong., 2d Sess., § 11(b) (1970), *reprinted in* Legislative History at 263-64. *See* S. Rep. No. 91-1282, 56-57 (1970), *reprinted in* Legislative History at 195-96, and *reprinted in* 1970 U. S. Code Cong'l & Admin. News, p. 5221 (Minority views of Senator Javits). An effort on the Senate floor to entirely eliminate administrative shutdowns, spearheaded by Senator Saxbe, fell short by only two votes. *See* 116 Cong. Rec. 37601-05 (1970) (roll call vote, and debate), *reprinted in* Legislative History at 451-61. However, additional safeguards were added to further minimize abuse—written notice and concurrence of a cabinet or sub-cabinet level official for plant closings. *See* 116 Cong. Rec. 37624, *reprinted in* Legislative History at 508-09.

43. H. Rep. No. 1765, 91st Cong., 2d Sess. 40 (1970), *reprinted in* Legislative History at 1193, *and reprinted in* 1970 U. S. Code Cong'l & Admin. News 5236.

Thus, the Act as finally passed contained no administrative shut down authority. Defendants argue that Congress could not have meant to give shut down authority to employees which it declined to give to inspectors.

Proper analysis of Congressional rejection of the Senate shut down provision must begin with the disputed section itself:

> If the Secretary determines that the imminence of a danger referred to in subsection (a) is such that immediate action is necessary, and the Secretary determines that there is not sufficient time, in light of the nature and imminence of the danger, to seek and obtain a temporary restraining order or injunction under subsection (a) of this section, the Secretary shall issue an order requiring such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibiting the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger, or to maintain the capacity of a continuous process operation to restart without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner. Such order may remain in effect for not more than seventy-two hours from the time of its issuance. If the Secretary delegates his authority to issue such an order to close a business or plant, in whole or in substantial part, he shall provide that such an order may not be issued until the employer has been notified in writing signed by the delegate of the Secretary, setting forth specifically the nature and imminence of the danger compelling immediate action and the concurrence of an official of the Labor Department appointed by the President with the advice and consent of the Senate is first obtained. The Secretary shall by regulation provide appropriate procedures whereby an employer may obtain expeditious informal reconsideration by officials of the Department of Labor of any order issued under this subsection.

S. 2193 § 12(b) (1970), *reprinted in* Legislative History at 562-63.

This provision is in no way similar to the regulation promulgated by the Secretary of Labor.[44] Section 12(b) allowed an official to close down an entire plant. Further, on the spot changes could be ordered solely on authority of an OSHA inspector. Apparently, only if a shut down order would close

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44. Detroit Steel argues that the following statement by Senator Williams shows that his bill provided for 72 hour shut downs in lieu of employee walking off the job:

> The committee bill, while guarding against frivolous complaints, permits employees or their representatives to request inspections where they believe that a violation of a safety and health standard exists that threatens physical harm or that an imminent danger exists.
>
> The substitute bill has absolutely no comparable provision for what in so many clearly life and death instances is the minimum assurance to which the employee is entitled.

116 Cong. Rec. 37340-41, *reprinted in* Legislative History at 432-33.

This statement arose when the Senate was considering choosing between Senator Williams' bill and a rival bill which was sponsored by Senator Peter Dominick, S. 4404, 91st Cong., 2d Sess. 1970, *reprinted in* Legislative History at 73.

This statement was made in the heat of debate; it was Senator Williams' ninth reason why his bill was superior to the alternative bill. Senator Williams' tenth reason went as follows:

> Tenth. The Committee bill provides that in imminent danger situations the Secretary may bring action in the appropriate U.S. district court for a temporary restraining order or an injunction requiring steps to be taken to correct, remove, or avoid the danger, and prohibiting the presence of individuals where the imminent danger exists.
>
> However, the bill authorizes the continued presence of individuals necessary to the correction or removal of the danger or to maintain the capacity of a continuous process operation to restart without a complete cessation of operations, and to permit any necessary shutdown of operations to be accomplished in a safe and orderly manner.
>
> The committee bill also permits the Secretary, if he determinues that the danger of death or serious harm is so immediate that action must be taken without awaiting the institution of court proceedings, to order such action to be taken and his order may remain in effect for 72 hours.
>
> This is one of the areas in which there is clearly a distinction between the bill as reported by the committee and the substitute

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a plant "in substantial part" did the inspector need to get permission from higher-ups.[45]

It is apparent from an examination of the legislative history that Congressional concern was directed to the possibilities of abuse of authority which lurked behind administrative shut downs. The provision was branded as unconstitutional.[46] Particular fears were voiced over the pressures which could be brought to bear on an inspector during a strike.[47] One can

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proposed. These are the true emergency situations where time manifestly is of the essence.

It is clear that Senator Williams' statement, in context, is consistent with the Secretary's regulation. Even if the opposite were true, the invidious comparison he drew between his bill and Senator Dominick's bill, in the frenzy of argument, is deserving of little weight in determining the meaning of his bill.

45. *See* 116 Cong. Rec. 37624, *reprinted in* Legislative History at 508 (Sen. Javits).

46. H. Rep. No. 1291, 91st Cong., 2d Sess. 56, *reprinted in* Legislative History at 886 (minority views) ("In essence, the exercise of this shut-down power amounts to summary punishment which is contrary to our established standards of law"); 116 Cong. Rec. 37602, *reprinted in* Legislative History at 453 (Sen. Schweiker) (". . . we must be sure that due process is observed through a judicial hearing"); 116 Cong. Rec. 38393, *reprinted in* Legislative History at 1050 (Rep. Michel); 116 Cong. Rec. 38702, *reprinted in* Legislative History at 1058 (Rep. Steiger); 116 Cong. Rec. 37338, *reprinted in* Legislative History at 425 (Sen. Dominick) ("all he has to do—one man, as an inspector—is to call the regional office or somebody else in the Labor Department and shut down the whole plant immediately, by an order, without any court findings, without any adjudication, without any due process."); 116 Cong. Rec. 37602, *reprinted in* Legislative History at 453 (Sen. Schweiker); 116 Cong. Rec. 37604, *reprinted in* Legislative History at 458 (Sen. Schweiker) ("I do not see why we cannot assure that due process is available before a lot of people are thrown out of work or an enterprise is shut down.")

47. *See* H. Rep. No. 91-1291, 91st Cong. 2d Sess. 56 (1970), *reprinted in* Legislative History at 886 (minority views) (". . . the all powerful inspector would become a pawn in labor disputes. . . . and in many cases he would be requested to inspect a plant simply to harass or intimidate employers."); 116 Cong. Rec. 38393, *reprinted in* Legislative History at 1050 (Rep. Michel); 116 Cong. Rec.

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easily discern the scenarios which Congress feared—an inspector confronting company officials with on the spot demands backed up by threats of partial shutdown. Or, striking workers pressuring an inspector to shut down a section of a plant manned by strikebreakers.

What Congress feared was arbitrary governmental authority brought to bear on an employer to take certain action. This is quite different from allowing workers to save themselves from apparent imminent harm. A vulnerable or misguided federal inspector might abuse his authority. Allowing an employee or group of employees to reasonably refuse to subject themselves to danger under this regulation presents no similar abuse possibilities. The employee cannot affirmatively order any changes; the fear of danger must be objectively reasonable and must be *subsequently* found such by the Courts; there must be insufficient time to go through normal enforcement channels; if no other work is available, the employee loses his/her pay. Thus, the regulation carefully restricts the exercise of the right it affords. In contrast § 23(b) imposed minimal curbs to protect against an abitrary inspector.[48] It was this inherent lack of control over a potentially abusive bureaucrat at which Congress recoiled.

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38374, *reprinted in* Legislative History at 1052 (Rep. Bloomfield) (". . . Labor Department inspector . . . may choose to shut down a plant arbitrarily and may be influenced by business or union pressure"); 116 Cong. Rec. 37346, *reprinted in* Legislative History at 448 (Sen. Tower) ("power . . . could easily be abused, culminating in a breakdown of existing Governmental neutrality in labor-management relations").

48. *See* fn. 45 and accompanying text.

As indicated in fn. 42, Congress kept adding more and more restrictions on the Secretary's proposed shut down powers, only to conclude in the end that the restrictions were insufficient and the power should be taken away entirely.

Filing suit against the inspector, of course, would be an ineffective after-the-fact gesture subject to an immunity defense. *See Butz* v. *Economou,* 98 S. Ct. 2894 (1978); *Granger* v. *Marek,* 583 F. 2d 781 (6th Cir. 1978).

The Secretary's regulation at issue in this case does not authorize self-help to pay without work. Under the regulation an employee who faces urgent danger of "life or serious injury" may do what the Thirteenth Amendment to the Constitution also allows. He may leave the job. If he does, however, the employer may discharge him. At that point not only does his pay cease, but he may have lost (possibly forever) many previously acquired seniority and pension rights. The regulation provides equitable relief to him when the Secretary has decided to file a complaint and there has been due process adjudication. At trial he must prove before a federal judge 1) his good faith in taking the action, 2) that he had no reasonable alternative, and 3) that his apprehension of death or serious injury was based on circumstances then facing him which would cause a reasonable person to reach the same conclusion, and 4) that the urgency of the situation provided "insufficient time . . . to eliminate the danger by resort to regular statutory enforcement channels."

This issue is better seen as presenting a situation in which "the courts must . . . in effect, consider what answer the legislature would have made as to a problem that was neither discussed nor contemplated." *Portland Cement Ass'n* v. *Ruckelshaus,* 486 F. 2d 375, 380 (D. C. Cir. 1973), *cert. denied,* 417 U. S. 921 (1974). As indicated in part II, *supra,* we think it is clear what answer Congress would have given had it directly considered the regulation.

Our conclusion is reinforced because when Congress subsequently directly addressed this question, when considering the Federal Mine Safety and Health Amendments of 1977, 91 Stat. 1290, 30 U. S. C. § 801 *et seq.,* it expressly indicated that a miner could refuse to work if he had a good faith belief that his job would subject him to unsafe or unhealthful working conditions. As here, the Mine Safety and Health Act does not expressly provide for that right.[49] However, that Act's

49. *See* fn. 13, *supra.*

legislative history makes it clear that Congress desired that miners be allowed to withdraw from danger on the job without fear of retaliation. The Senate Report accompanying the Act provides:

> This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

S. Rep. No. 95-181 36 (1977), *reprinted in* 1977 U. S. Code, Cong'l & Admin. News 3401, 3436. Nor can it be said that this issue surreptitiously sneaked by Congress; it was openly raised on the Senate Floor:

> MR. CHURCH. I wonder if the distinguished chairman would be good enough to clarify a point concerning section 10600, the discrimination clause?
>
> It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protecting them against any possible discrimination which they might suffer as a result of their actions to afford themselves of the protection of the act.
>
> It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?
>
> MR. WILLIAMS. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.
>
> The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners.
>
> MR. JAVITS. I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would

> not be able to afford themselves their rights under the full protection of the act as responsible human beings.

123 Cong. Rec. at S10287-88 (daily ed. June 21, 1977). Similar sentiments were voiced on the House floor:

> If miners are to invoke their rights and to enforce the act as we intend, they must be protected from retaliation. In the past, administrative rulings of the Department of the Interior have improperly denied the miner the rights Congress intended. For example, *Baker* v. *North American Coal Co.*, 8 IBMA 164 (1977) held that a miner who refused to work because he had a good faith belief that his life was in danger was not protected from retaliation because the miner had no "intent" to notify the Secretary. This legislation will wipe out such restrictive interpretations of the safety discrimination provision and will insure that they do not recur.

123 Cong. Rec. at H. 11662 (daily ed. Oct. 27, 1977) (Rep. Perkins). Significantly, our review of the floor debates reveals no controversy whatsoever on this issue, although other provisions of the Act were heatedly debated.[50]

We are aware that this was not the same Congress which passed the Occupational Safety and Health Act. We are also aware that this Act has less far-reaching effect than the Occupational Safety and Health Act.[51] At the same time, we cannot ignore the utter lack of controversy when Congress squarely faced the walk-off-the-job-in-the-face-of-danger issue at a later time. We additionally note the prominent endorsement of the Secretary's position here by three persons who were instrumental in the passage of OSHA—Senators Williams and Javits and Congressman Perkins. We do not think that these gentle-

50. *See* 123 Cong. Rec. S10286-S10305 (daily ed. June 21, 1977); H7184-H7221 (daily ed. July 15, 1977). *See also* House Conference Report No. 95-655, 37-68 (1977), *reprinted in* 1977 U. S. Code Cong'l and Admin. News pp. 3485-3516.

51. As of this writing, OSHA covers all businesses affecting interstate commerce. 29 U. S. C. § 652(5). *See Goodwin* v. *O. S. H. R. C.*, 540 F. 2d 1013 (9th Cir. 1976). The Mine Health and Safety Act covers all mining. 30 U. S. C. §§ 802(h)(1), 803.

men—or Congress—would endorse self-protection for miners and deny that same self-protection to other workers.

IV.

In conclusion, we perceive no mandate in OSHA's legislative history that we deprive American workers of the limited protection afforded them by the regulation. We are persuaded that the regulation is a valid exercise of the Secretary's broad rule-making authority and that it is consistent with the Act and with Congressional intent.

We are aware that our holding places us squarely in conflict with that of the Fifth Circuit in *Marshall* v. *Daniel Construction Co.*, 563 F. 2d 707 (5th Cir. 1977), *cert. denied*, 47 U. S. L. W. 3226 (U. S. Oct. 2, 1978). However we cannot, in good conscience, adopt that court's reasoning. Instead, we find ourselves in full agreement with Judge John Minor Wisdom's dissent in that case and with his conclusion that the same Congress which wanted employees to work in safe and healthful surroundings could not have meant for them to die at their posts. A worker should not have to choose between his job and his life without the reasonable safeguard provided by this regulation.

The judgments below are reversed and remanded for further proceedings. The district judge's findings of fact in No. 76-2144 are affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

RAY MARSHALL, Secretary of Labor,
Appellant,

vs.

WHIRLPOOL CORPORATION and EMPIRE-DETROIT STEEL DIV. DETROIT STEEL CORP.,
Appellees.

Nos. 76-2143 and 76-2261

WHIRLPOOL CORPORATION,
Cross-Appellant,

vs.

RAY MARSHALL, Secretary of Labor,
Cross-Appellee.

No. 76-2144

Filed Apr. 4, 1979
John P. Hehman, Clerk

ORDER.

Before: EDWARDS, *Chief Judge*, KEITH and MERRITT, *Circuit Judges*

The Whirlpool Corporation and Empire-Detroit Steel Division of Detroit Steel Corporation have both filed Petitions for Rehearing and Suggestions for Rehearing en banc. No active Circuit Judge having voted for en banc consideration, the Petitions have been referred to the hearing panel for disposition.

In its Petition for Rehearing, the Whirlpool Corporation suggests that our concern with the validity of the regulation may have caused us to give inadequate consideration to its factually-oriented cross-appeal relating to the validity of the district court's findings. However, as we noted in fn. 5 of our opinion, we did carefully examine the record and concluded that there was "ample support" for the district court's findings of fact. Nothing in Whirlpool's Petition for Rehearing persuades us to retreat from that position.

Detroit Steel's Petition for Rehearing basically presents two separate questions. Detroit Steel first argues that our decision impermissibly expands federal jurisdiction. We think that this argument confuses cause of action with subject matter jurisdiction. Subject matter jurisdiction can only be conferred on a federal court by express Congressional grant. Absent this grant, a federal court has no power to rule on a case. A federally created cause of action, on the other hand, goes to the question whether a party has the right to bring suit. *See Hagans* v. *Lavine*, 415 U. S. 528, 539-43 (1974).

In this case, Congress has conferred subject matter jurisdiction upon the federal courts to adjudicate suits brought by the Secretary of Labor on behalf of employees who have been discriminated against for the exercise of their rights under OSHA. 29 U. S. C. 660(c)(2) specifically states that "the United States district courts shall have jurisdiction, for cause shown to restrain violations of [29 U. S. C. 660(c)(1)] . . ." Thus, 29 U. S. C. 660(c)(2) confers subject matter jurisdiction to determine whether the Secretary has properly stated a valid cause of action under 29 U. S. C. 660(c)(1). In our opinion, we approved a liberal construction of 29 U. S. C. 660(c)(1), which goes to whether the circumstances before us stated a valid cause of action. Although this construction may have the incidental effect of expanding the *number* of cases which the Secretary can file in the federal district courts, it is not an expansion of subject matter jurisdiction. *See also* our discussion of federal

law relating to implied causes of action in footnote 22 of our opinion.

Detroit Steel secondly argues that we failed to consider serious factual deficiencies in the Secretary's case against it. Additionally, Detroit Steel argues that we should have followed *Satterwhite* v. *United Parcel Service, Inc.*, 496 F. 2d 448 (10th Cir. 1974), *cert. denied*, 419 U. S. 1079 (1974), which concluded that where a grievance is subject to arbitration under a collective bargaining agreement, employees may not thereafter maintain a factually identical cause of action under the Fair Labor Standards Act.

These arguments are all premature. The Secretary's action against Detroit Steel was dismissed on the pleadings because OSHA "does not provide a statutory or legal basis for the maintenance of a suit by the plaintiff on behalf of an employee who was disciplined by the Defendant for the employee's refusal to perform assigned work . . ." *See* Entry Granting Defendant's Motion for Summary Judgment, *reproduced in* Joint Appendix at 13. Thus, there is no record below for us to consider specific factual matters. All that we have done is rule that the Secretary stated a valid cause of action against Detroit Steel. It may well be that this suit should be precluded if arbitration took place or that a district court could conclude as a factual matter that the regulation was not violated. We can express no views on these questions since they were not presented to the district court and were not ruled upon by it. Our ruling does not prevent Detroit Steel from making these arguments to the district court on remand, but they are not properly before us now.

Upon consideration, we conclude that the Petitions for Rehearing are without merit. The Petitions for Rehearing are, in all respects, Denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Western Division

W. J. USERY, Secretary of Labor,
Plaintiff,

vs.

WHIRLPOOL CORPORATION,
Defendant.

Civil No. C 74-359

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

YOUNG, J.:

This cause is before the Court on a complaint filed by the Secretary of Labor against the Whirlpool Corporation (hereafter Whirlpool), pursuant to § 11(c) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § 660(c)(1) (hereafter the ACT). The Secretary is seeking lost wages, expungement of written reprimands and injunctive relief for two Whirlpool employees who were allegedly discriminated against due to their refusal to subject themselves to possible serious injury or death arising from a hazardous condition at their workplace.

There is little dispute over the facts in this case and, therefore, the Court will not dwell on them at great length. The defendant corporation maintains a facility at Marion, Ohio, where it manufactures household appliances. Present in the Marion plant are mechanical conveyors which are used to move parts from point to point within the plant. A guard screen is utilized

in order to protect the employees working beneath the conveyor from the hazard of falling materials. Said guard screen is suspended approximately twenty feet above the plant floor and covers about 295,800 square feet hung under 65,000 linear feet of conveyor. The guard screen was suspended over about 36% of the total plant floor area.

It is among the duties of the maintenance department employees to clean the guard screen. This includes the removal of parts after they may have fallen from the conveyor and the placing of paper used to cach oil and grease drippings.

On June 28, 1974, a maintenance employee, George Cowgill, fell approximately twenty feet from the guard screen into a parts box. Hours after the accident, Mr. Cowgill died. An investigation by the Occupational Safety and Health Administration (hereafter OSHA) followed Mr. Cowgill's death. OSHA cited the defendant, charging a serious violation of the general duty clause of the ACT, 29 U. S. C. § 654. The citation required immediate abatement and proposed a $600.00 penalty. Said citation is being contested by the defendant in a matter now pending before the Occupational Safety and Health Review Commission.

The complainants in this case are also maintenance workers charged with the duty of cleaning the guard screen. On July 10, 1974, the complainants, Mr. Deemer and Mr. Cornwell, reported for work and were told by their foreman, Gale Price, to clean the guard screen except for three areas where he did not feel that screen was adequately supported to walk on. Upon receiving the order, the complainants refused to obey it, stating that they believed that the screen was unsafe. They were then taken to the office of the personnel director where they were issued written reprimands and sent home losing six hours pay.

The defendant attempted to prove at trial that the complainants walked off their jobs not because they felt it was unsafe, but rather because they wanted an increase in pay for performing such work. The Court, however, is not willing to

accept this contention and expressly finds that the employees refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm. This is supported by the fact that the foreman was not willing to allow them to use the Verta-lite procedure for cleaning the screen. Said procedure was an alternative to walking the screen developed after Mr. Cowgill's death. Furthermore, given that death, it is perfectly understandable that surviving employees would be reluctant to subject themselves to the possibility of a similar accident. The Court further finds that the threat of death or serious bodily harm was real and not something which existed only in the minds of the employees. While the defendant had begun to replace the original mesh panels of the screen with panels constructed of heavier gauge metal mesh having spiral wire connections, at the time in question only about one-third of the entire screen had been replaced. Certainly the fact that a man had fallen through the screen and been killed is the strongest possible evidence that it was unsafe and dangerous. Thus the Court finds that the job of cleaning the guard screen did present a danger of death of serious bodily harm.

The Secretary is complaining that the employees involved in this case are being discriminated against by the defendant as a result of exercising rights afforded to them under the ACT. 29 U. S. C. § 660(d)(1) states:

> No person shall discharge or in any manner discriminate against any employee because such employees has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

Pursuant to his authority under the ACT to issue regulations, the Secretary promulgated 29 C. F. R. § 1977.12(b)(2), which states:

> However, occasions might arise when an employee is confronted with a choice between [not] performing assigned

> tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employees, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

Under this regulation, it is clear that the employees were justified in walking off the job. The Court has held that there was no reasonable alternative and has further held that the employees' action was a good faith refusal to expose themselves to a dangerous condition. These findings, however, are not, by themselves, dispositive of this matter. The defendant argues that the regulation quoted above is clearly inconsistent with the statute and is thus invalid. This issue is the major question presented to the Court in this case.

Successfully challenging administrative regulations is a very difficult task. Once promulgated, regulations have the force of law and the presumption of validity. *United States* v. *Mersky*, 361 U. S. 431, 437-38.

> When faced with a problem of statutory construction, this Court shows great deference to the interpretations given the statute by officers of the agency charged wilth its administration. "To sustain the commission's application of the statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in a judicial proceeding." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).

> The above-quoted language is especially true when the administrative procedure being challenged involves a contemporaneous construction of a statute by men charged with the responsibility of setting its machinery into motion. *Zuber* v. *Allen*, 396 U. S. 168, 192 (1969). However, if the inconsistency between the regulation and the statute is so clear that the Court has no choice except to hold that the administrator has exceeded his authority and employed means that are not appropriate to the end specified in the Act, the Court must find the regulation invalid. *Gardner* v. *United States*, 239 F. 2d 234 (5th Cir. 1956); *See also, Commissioner of Internal Revenue* v. *South Texas Lumber Company*, 333 U. S. 496 (1948).

This Court is of the opinion that the regulation in question is clearly inconsistent with the statute and therefore invalid. The reason for this holding is that the Congress squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not.

When the Occupational Safety and Health Act was first reported out of committee in the House of Representatives, it contained a provision which would allow employees to absent themselves from a dangerous situation without a loss of pay. 116 Cong. Rec. 38,369, 38,377, 38,378 (1970). The sponsor of the bill in committee, Congressman Daniels of Kentucky, stated:

> The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to risk of harm. 116 Cong. Rec. 38,377, 78. (1970).

The bill, as originally reported out of committee, also contained a provision which would have permitted on OSHA inspector to close down a plant operation for up to 72 hours if he found that an imminent danger existed. 116 Cong. Rec. 38,369 (1970). This provision of the bill was also amended so that no shut-down could occur without the application and granting of a temporary restraining order by a federal district judge. *Id.* at 38,376. The version of the ACT, as passed and approved by the Senate, however, did contain a provision allowing an inspector to close down an operation for 72 hours. In conference committee, however, the Senate receded. *U. S. Code, Cong. & Admin. News,* 91st Cong. 2d Sess., at 5236 (1970). Thus the imminent danger section of the ACT as finally signed into law reads as follows:

> (a) The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

It is eminently clear then that in considering the best methods for dealing with imminent danger situations, Congress considered and rejected employees walking off the job with pay. They also rejected allowing an inspector to close down an

operation. It is obvious that Congress considered the shut-down of an operation such a serious matter that nothing short of the judicial process with its full complement of due process protections was acceptable as a means of accomplishing it. Certainly allowing employees to simply walk off the job was not acceptable. *See Dunlop* v. *Daniel Construction Company, Inc.,* No. C 75-26-N (N. D. Ga. filed Dec. 5, 1975).

Since the Court finds the regulation in question to be invalid, it will enter judgment for defendant. This opinion will serve as the Court's findings of fact and conclusions of law. Such findings moot the defendant's motion to dismiss which was filed just prior to trial.

For the reasons stated herein, good cause appearing, it is

ORDERED that the Court finds 29 C. F. R. § 1977.12(b)(2) to be invalid as inconsistent with the Occupational Safety and Health Act of 1970 and therefore finds in favor of the defendant and the clerk shall enter judgment for the defendant and the defendant shall go hence without day and collect its costs, and it is

FURTHER ORDERED that the motion to dismiss filed by the defendant should be, and it hereby is, overruled as moot.

IT IS SO ORDERED.

/s/ WM. J. YOUNG
United States District Judge

Toledo, Ohio.

APPENDIX D.

Pertinent regulations of the Department of Labor implementing the Occupational Safety and Health Act of 1970

(Codified at 29 C. F. R. 1971.1-1971.12)

GENERAL

§ 1977.1 Introductory statement.

(a) The Occupational Safety and Health Act of 1970 (29 U. S. C. 651, et seq.), hereinafter referred to as the Act, is a Federal statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and healthier workplaces throughout the Nation. By terms of the Act, every person engaged in a business affecting commerce who has employees is required to furnish each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm, and, further, to comply with occupational safety and health standards promulgated under the Act. See Part 1975 of this chapter concerning coverage of the Act.

(b) The Act provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces, and recordkeeping requirements. Enforcement procedures initiated by the Department of Labor, review proceedings before an independent quasi-judicial agency (the Occupational Safety and Health Review Commission), and express judicial review are provided by the Act. In addition, States which desire to assume responsibility for development and enforcement of

standards which are at least as effective as the Federal standards published in this chapter may submit plans for such development and enforcement of the Secretary of Labor.

(c) Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity.

(d) This part deals essentially with the rights of employees afforded under section 11(c) of the Act. Section 11(c) of the Act prohibits reprisals, in any form, against employees who exercise rights under the Act.

§ 1977.2 Purpose of this part.

The purpose of this part is to make available in one place interpretations of the various provisions of section 11(c) of the Act which will guide the Secretary of Labor in the performance of his duties thereunder unless and until otherwise directed by authoritative decisions of the courts, or concluding, upon reexamination of an interpretation, that it is incorrect.

§ 1977.3 General requirements of section 11(c) of the Act.

Section 11(c) provides in general that no person shall discharge or in any manner discriminate against any employee because the employee has: (a) Filed any complaint under or related to the Act; (b) Instituted or caused to be instituted any proceeding under or related to the Act; (c) Testified or is about to testify in any proceeding under the Act or related to the Act; or (d) Exercised on his own behalf or on behalf of others any right afforded by the Act. Any employee who believes that he has been discriminated against in violation of section 11(c) of the Act may, within 30 days after such violation occurs, lodge a complaint with the Secretary of Labor alleging such violation.

The Secretary shall then cause appropriate investigation to be made. If, as a result of such investigation, the Secretary determines that the provisions of section 11(c) have been violated civil action may be instituted in any appropriate United States district court, to restrain violations of section 11(c)(1) and to obtain other appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay. Section 11(c) further provides for notification of complainants by the Secretary of determinations made pursuant to their complaints.

§ 1977.4 Persons prohibited from discriminating.

Section 11(c) specifically states that "no person shall discharge or in any manner discriminate against any employee" because the employee has exercised rights under the Act. Section 3(4) of the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any group of persons." Consequently, the prohibitions of section 11(c) are not limited to actions taken by employers against their own employees. A person may be chargeable with discriminatory action against an employee of another person. Section 11(c) would extend to such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee. See, *Meek* v. *United States,* 136 F. 2d 679 (6th Cir., 1943); *Bowe* v. *Judson C. Burns,* 137 F. 2d 37 (3rd Cir., 1943).

§ 1977.5 Persons protected by section 11(c).

(a) All employees are afforded the full protection of section 11(c). For purposes of the Act, an employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." The Act does not define the term "employ." However, the broad remedial nature of this

legislation demonstrates a clear congressional intent that the existence of an employment relationship, for purposes of section 11(c), is to be based upon economic realities rather than upon common law doctrines and concepts. See, *U. S.* v. *Silk,* 331 U. S. 704 (1947); *Rutherford Food Corporation* v. *McComb,* 331 U. S. 722 (1947).

(b) For purposes of section 11(c), even an applicant for employment could be considered an employee. See, *NLRB* v. *Lamar Creamery,* 246 F. 2d 8 (5th Cir., 1957). Further, because section 11(c) speaks in terms of any employee, it is also clear that the employee need not be an employee of the discriminator. The principal consideration would be whether the person alleging discrimination was an "employee" at the time of engaging in protected activity.

(c) In view of the definitions of "employer" and "employee" contained in the Act, employees of a State or political subdivision thereof would not ordinarily be within the contemplated coverage of section 11(c).

§ 1977.6 Unprotected activities distinguished.

(a) Actions taken by an employer or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of section 11(c) apply when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in activities protected by the Act does not automatically render him immune from discharge or discipline for legitimate reasons, or from adverse action dictated by non-prohibited considerations. See, *NLRB* v. *Dixie Motor Coach Corp.,* 128 F. 2d 201 (5th Cir., 1942).

(b) At the same time, to establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the

action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity, section 11(c) has been violated. See, *Mitchell* v. *Goodyear Tire & Rubber Co.*, 278 F. 2d 562 (8th Cir., 1960); *Goldberg* v. *Bama Manufacturing*, 302 F. 2d 152 (5th Cir., 1962). Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.

SPECIFIC PROTECTIONS

§ 1977.9 Complaints under or related to the Act.

(a) Discharge of, or discrimination against, an employee because the employee has filed "any complaint * * * under or related to this Act * * *" is prohibited by section 11(c). An example of a complaint made "under" the Act would be an employee request for inspection pursuant to section 8(f). However, this would not be the only type of complaint protected by section 11(c). The range of complaints "related to" the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power. (See Cong. Rec., vol. 116 p. P. 42206 Dec. 17, 1970).

(b) Complaints registered with other Federal agencies which have the authority to regulate or investigate occupational safety and health conditions are complaints "related to" this Act. Likewise, complaints made to State or local agencies regarding occupational safety and health conditions would be "related to" the Act. Such complaints, however, must relate to conditions at the workplace, as distinguished from complaints touching only upon general public safety and health.

(c) Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters

with their employers. (Section 2(1), (2), and (3)). Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.

§ 1977.10 Proceedings under or related to the Act.

(a) Discharge of, or discrimination against, any employee because the employee has "instituted or caused to be instituted any proceeding under or related to this Act" is also prohibited by section 11(c). Examples of proceedings which could arise specifically under the Act would be inspections of worksites under section 8 of the Act, employee contest of abatement date under section 10(c) of the Act, employee initiation of proceedings for promulgation of an occupational safety and health standard under section 6(b) of the Act and part 1911 of this chapter, employee application for modification of revocation of a variance under section 6(d) of the Act and part 1905 of this chapter, employee judicial challenge to a standard under section 6(f) of the Act and employee appeal of an Occupational Safety and Health Review Commission order under section 11(a) of the Act. In determining whether a "proceeding" is "related to" the Act, the considerations discussed in § 1977.9 would also be applicable.

(b) An employee need not himself directly institute the proceedings. It is sufficient if he sets into motion activities of others which result in proceedings under or related to the Act.

§ 1977.11 Testimony.

Discharge of, or discrimination against, any employee because the employee "has testified or is about to testify" in proceedings under or related to the Act is also prohibited by section 11(c). This protection would of course not be limited to testimony in proceedings instituted or caused to be instituted by the employee,

but would extend to any statements given in the course of judicial, quasi-judicial and administrative proceedings, including inspections, investigations, and administrative rule making or adjudicative functions. If the employee is given or is about to give testimony in any proceeding under or related to the Act, he would be protected against discrimination resulting from such testimony.

§ 1977.12 Exercise of any right afforded by the Act.

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances,

therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

[38 FR 2681, Jan. 29, 1973, as amended at 38 FR 4577, Feb. 16, 1973]

APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1870

WHIRLPOOL CORPORATION,

Petitioner,

vs.

RAY MARSHALL, SECRETARY OF LABOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 19, 1979
CERTIORARI GRANTED OCTOBER 1, 1979.

IN THE

Supreme Court of the United States

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APPENDIX.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
8–29–74	Complaint filed as Case No. C74 359, U. S. District Court for the Northern District of Ohio, Western Division.
10–21–74	Defendant's Answer filed.
10–22–75	Pretrial Order entered.
3–25–76	Cause called for trial. Trial held, concluded.
6–21–76	Opinion, Findings of Fact, Conclusions of Law entered. Judgment for Defendant. Case dismissed.
7–16–76	Notice of Appeal filed by Plaintiff.
7–29–76	Notice of Cross-Appeal filed by Defendant.
6–21–78	Oral Argument before Sixth Circuit.
7– 5–78	Order entered directing supplemental briefing.
2–22–79	Opinion and Order of Sixth Circuit Reversing District Court Order and Remanding Cause.
4– 4–79	Order of Sixth Circuit amending Opinion entered February 22, 1979.
4– 4–79	Petitions for Rehearing and Rehearing *En Banc* denied.
4–19–79	Order Staying Mandate issued.
6–19–79	Petition for Certiorari filed by Whirlpool Corporation.
10– 1–79	Order of Supreme Court granting Petition for Certiorari.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Western Division

Peter J. Brennan, Secretary of Labor,
United States Department of Labor,
Plaintiff,
vs.
Whirlpool Corporation
(Marion Division),
Defendant.

Judge Don J. Young
Civil Action
No. C74 359

COMPLAINT

Plaintiff, Peter J. Brennan, Secretary of Labor, United States Department of Labor, brings this action for an injunction and other relief pursuant to his statutory authority to enforce the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1590 *et seq.*; 29 U. S. C. § 651 *et seq.*), hereinafter called the Act.

I

Jurisdiction of this action is conferred upon the Court by Section 11(c)(2) of the Act (29 U. S. C. § 660(c)(2)).

II

Defendant Whirlpool Corporation has a place of business and manufacturing plant located in Marion, Ohio, within the jurisdiction of this Court, where it produces goods which are shipped outside Ohio, being thereby a business affecting commerce within the meaning of the Act.

III

On or about July 10, 1974, Virgil G. Deemer and Thomas A. Cornwell, employees of defendant, refused to perform work assignments at defendant's plant, on the ground that such assignments posed a danger to them of death or serious bodily harm. Defendant issued written reprimands and disciplinary suspensions to these employees.

IV

On July 15, 1974, employees Deemer and Cornwell filed written complaints with the Columbus Area Office, Occupational Safety and Health Administration, pursuant to Section 11(c)(2) of the Act. Upon receipt of these complaints, representatives of the Secretary of Labor caused an investigation to be made and determined that the provisions of Section 11(c) of the Act had been violated.

V

Defendant's reprimands and disciplinary suspensions issued to employees Deemer and Cornwell constituted violations of Section 11(c)(1) of the Act (29 U. S. C. § 660(c)(1), in that they constituted discrimination against employees because of the exercise by such employees of rights afforded by the Act. A judgment restraining such violations and ordering all appropriate relief, including back pay, is expressly authorized by Section 11(c)(2) of the Act.

WHEREFORE, cause having been shown, plaintiff prays:

1. That a permanent injunction be issued, ordering defendant to compensate employees Virgil G. Deemer and Thomas A. Cornwell for the periods of the said disciplinary suspensions.

2. That an injunction be issued, ordering defendant to post in a prominent place, for 60 consecutive days, a

notice stating that it will not in any manner discriminate against employees because of engagement in activities protected by Section 11(c) of the Act, and offering to make employees Deemer and Cornwell whole for any loss of pay suffered as the result of such discrimination.

3. That defendant be ordered to expunge from its personnel files all references to such reprimands or disciplinary suspensions.

4. For such other and further relief as may be necessary and appropriate.

/s/ GREGORY B. TAYLOR
Gregory B. Taylor, Trial Attorney
for Plaintiff

U. S. Department of Labor
881 Federal Office Building
1240 East Ninth Street
Cleveland, Ohio 44199
Area Code 216-523-3873

Of Counsel:
William J. Kilberg
Solicitor of Labor
Herman Grant
Regional Solicitor
W. S. Kloepfer
Associate Regional Solicitor

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Western Division

Peter J. Brennan, Secretary of Labor,
United States Department of Labor,
Plaintiff,
vs.
Whirlpool Corporation
(Marion Division),
Defendant.
Civil No. C74 359

ANSWER

Now comes the Defendant, Whirlpool Corporation (Marion Division), a corporation, and for its answer to the complaint of the Plaintiff, Peter J. Brennan, Secretary of Labor, United States Department of Labor, states as follows:

(1) Denies the allegations of Paragraph I of the Complaint.

(2) Admits the alegations in Paragraph II of the Complaint that it has a manufacturing plant in Marion, Ohio, and that it produces goods shipped in interstate commerce, and denies all other allegations of Paragraph II of the complaint.

(3) Admits the allegations in Paragraph III of the complaint that Virgil G. Deemer and Thomas A. Cornwell, employees of Defendant, refused to perform work assignments on or about July 10, 1974, and that the Defendant issued written reprimands and suspensions to the employees; it denies al other allegations of Paragraph III of the Complaint.

(4) Denies any knowledge of the allegations in Paragraph IV of the Complaint.

(5) Denies the allegations in Paragraph V of the complaint.

First Affirmative Defense

The allegations of Plaintiff's Complaint fail to state a claim or cause of action upon which relief can be granted.

Second Affirmative Defense

The allegations of Plaintiff's Complaint purport to assert a cause of action, the subject matter of which consists of alleged interference with rights arguably protected by the Occupational Safety and Health Act of 1970 29 U. S. C. A. Section 651 *et seq.*, and accordingly the Court has no jurisdiction over said subject matter of the Complaint since the matters contained therein fall within the sole and exclusive jurisdiction of the Occupational Safety and Health Review Commission under the well established doctrine of federal preemption.

WHEREFORE, Defendant, Whirlpool Corporation (Marion Division), a Corporation, denies that Plaintiff is entitled to the relief demanded or any other relief.

Charles Putnam
and
O. E. Firstenberger
Whirlpool Corporation
Benton Harbor, Michigan 49022

Robert E. Mann
and
Raymond J. Kelly
111 West Jackson Boulevard
Chicago, Illinois 60604

Seyfarth, Shaw, Fairweather
& Geraldson
Chicago, Illinois
Of Counsel

and

E. Thomas Maguire
425 Libbey-Owens-Ford Building
Toledo, Ohio 43624
Attorneys for Defendant

Respectfully submitted,

Robison, Curphey & O'Connell

E. Thomas Maguire
Toledo, Ohio 43624
Attorneys for Defendant

Robison, Curphey
& O'Connell
Toledo, Ohio
Of Counsel

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Western Division

Secretary of Labor, *Plaintiff,* *vs.* Whirlpool Corporation, *Defendant.*	No. C-74-359 Opinion Findings of Fact and Conclusions of Law

The Opinion, Findings of Fact and Conclusions of Law entered by the District Court June 21, 1976, 416 F. Supp. 30, are reprinted in Appendix C of the Petitioner for Writ of Certiorari at pp. A43-A49.

IN THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Ray Marshall, Secretary of Labor, *Appellant,* *vs.* Whirlpool Corporation and Empire-Detroit Steel Div., Detroit Steel Corporation, *Appellees,*	Nos. 76-2143 and 76-2261
Whirlpool Corporation, *Cross-Appellant,* *vs.* Ray Marshall, Secretary of Labor, *Cross-Appellee.*	No. 76-2144

Decided and Filed February 22, 1979

Before: EDWARDS, *Chief Judge;* KEITH and MERRITT, *Circuit Judges.*

The decision for the United States Court of Appeals for the Sixth Circuit, entered February 22, 1979, is reprinted as Appendix A of the Petition for Writ of Certiorari at pp. A1-A39.

IN THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Ray Marshall, Secretary of Labor, *Appellant*, *vs.* Whirlpool Corporation and Empire-Detroit Steel Div., Detroit Steel Corporation, *Appellees*,	Nos. 76-2143 and 76-2261
Whirlpool Corporation, *Cross-Appellant*, *vs.* Ray Marshall, Secretary of Labor, *Cross-Appellee*.	No. 76-2144

ORDER OF AMENDMENT

Before: EDWARDS, Chief Judge, KEITH and MERRITT, Circuit Judges.

This Court's opinion of February 22, 1979 is hereby amended as follows:

1. At the end of footnote 18, add *"See Baker* v. *U. S. Dept of the Interior, Board of Mine Operations Appeals,* ..... F. 2d .....(No. 77-1973, D. C. Circuit, *decided* Nov. 29, 1978)."

2. At the end of footnote 23, add "; M. Rothstein, Occupational Safety and Health Law §§ 186 et seq. (West. 1978).

Entered by Order of the Court
/s/ JOHN P. HEHMAN
Clerk

IN THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Ray Marshall, Secretary of Labor, *Appellant*, *vs.* Whirlpool Corporation and Empire-Detroit Steel Div., Detroit Steel Corporation, *Appellees*,	Nos. 76-2143 and 76-2261
Whirlpool Corporation, *Cross-Appellant*, *vs.* Ray Marshall, Secretary of Labor, *Cross-Appellee*.	No. 76-2144

Filed April 4, 1979

John P. Hehman, Clerk

ORDER

Before: EDWARDS, *Chief Judge;*
KEITH and MERRITT, *Circuit Judges*

The Order of the Sixth Circuit denying petitions for rehearing and rehearing *en banc* is reprinted as Appendix B to the Petition for Certiorari, pp. A40-A42.

SUPREME COURT OF THE UNITED STATES

October Term, 1978

Whirlpool Corporation,
Petitioner,
vs.
Ray Marshall, Secretary of Labor,
Respondent.

No. 78-1870

Facts and Opinion D. C., 416 F. Supp. 30; 593 F. 2d 715.

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

October 1, 1979. Granted.

No. 78-1870

In the Supreme Court of the United States

OCTOBER TERM, 1978

WHIRLPOOL CORPORATION, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN A. CLAUSS
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for
Occupational Safety and Health

ALLEN H. FELDMAN
Acting Counsel for
Appellate Litigation

DENNIS K. KADE
Assistant Counsel for
Appellate Litigation

THOMAS L. HOLZMAN
Attorney
Department of Labor
Washington, D.C. 20210

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1870

WHIRLPOOL CORPORATION, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 593 F. 2d 715. The opinion of the district court is reported at 416 F. Supp. 30 (Pet. App. A43-A49).

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1979, and a petition for rehearing was denied on April 4, 1979 (Pet. App. A40-A42). The petition for a writ of certiorari was filed on June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in implementing the Occupational Safety and Health Act of 1970, the Secretary of Labor may proscribe

employer retaliation against an employee for his refusal to perform particular tasks he reasonably believes present an immediate danger of death or serious injury.

STATEMENT

This suit was brought by the Secretary of Labor under Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1) (OSHA), which forbids any discrimination against an employee "because of the exercise by such employee * * * of any right afforded by this Act."[1] The Secretary alleged that petitioner had violated 29 C.F.R. 1977.12, a Department of Labor regulation implementing Section 11(c)(1) that protects an employee, in narrowly limited circumstances, from employer retaliation for the employee's refusal to perform assigned tasks that he reasonably believes would subject him to serious injury or death.[2]

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[1]Section 11(c)(2) of the Act, 29 U.S.C. 660(c)(2), directs the Secretary to investigate employee complaints of violations of Section 11(c)(1) and, if he finds a complaint justified, to bring suit against the employer. Section 11(c)(2) further provides that the district courts "shall have jurisdiction * * * to restrain violations of [Section 11(c)(1)] and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

[2]In pertinent part, 29 C.F.R. 1977.12 provides:

> (b)(1) * * * [R]eview of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace.
>
> * * * * *
>
> (2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

The record discloses that petitioner operates a manufacturing plant in Marion, Ohio, to produce household appliances. The appliance components are transported in the plant on overhead conveyors. Wire mesh guard screens some 20 feet above the plant floor protect the workers from parts that occasionally drop off the conveyors (Pet. App. A5; J.A. 20-22).[3] Maintenance employees remove fallen parts from the screens, replace papers spread on the screens to catch grease drippings, and provide necessary maintenance on the conveyors. These duties require the employees to walk on the screens (*ibid.*).[4]

Petitioner began replacing the original mesh screens in 1973, after several workers fell through them (J.A. 21, 41, 48-49, 52-53, 68-69, 73, 102). By mid-1974, about one third of the original screening had been replaced with heavier, more securely attached screens, which were safer to walk on (J.A. 19, 21, 54, 100, 138, 153-154, 160-163, 179). On June 28, 1974, a maintenance employee fell to his death through a section where the stronger wire mesh had not yet been installed (J.A. 26, 35, 100, 127, 140). As

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[3]"J.A." refers to the joint appendix in the court of appeals.

[4]The maintenance force consists of 88 men, who spend a total of 15 to 30 man hours a week on the screens (J.A. 22, 101). Work on the screens is apparently highly intermittent for any single employee (see, *e.g.*, J.A. 36-37, 46-47, 67, 77-78, 81-83).

a result of that accident, an OSHA inspector visited petitioner's plant and issued a citation on July 9, 1974, charging petitioner with failing to provide a safe workplace for its employees (J.A. 17, 96-97).[5]

On July 10, 1974, two night shift maintenance employees refused to walk on the old style screening on the ground that it was unsafe (J.A. 147-151, 159-160).[6] The employees had previously complained about the safety of the screening (J.A. 139, 170, 185), and one of them had discussed his concerns with a local OSHA representative (J.A. 144-146). After their refusal to walk on the screens, the employees were placed on disciplinary suspension for the remainder of the shift and were given written reprimands for insubordination (J.A. 15-16, 151, 176).[7]

The district court agreed with the Secretary that the employees' actions were protected by 29 C.F.R. 1977.12(b)(2)—that is, the employees had refused in good faith to perform an assigned task that they reasonably concluded posed a real danger of death or serious injury, in a situation in which there was insufficient time to resort to regular statutory enforcement channels to eliminate the danger and in which correction of the dangerous condition had been unsuccessfully sought from the

---

[5]Petitioner's challenge to the citation is currently pending in the United States Court of Appeals for the District of Columbia Circuit (No. 79-1692), after extensive administrative litigation (see Pet. App. A6 n.6).

[6]Petitioner claimed below that the employees' refusal to walk on the screens was motivated by a desire for higher pay. Both lower courts rejected this contention (Pet. App. A5 & n.5, A44-A45), and petitioner does not raise it here.

[7]By virtue of the suspension each employee lost approximately 6 hours' pay, about $25 (J.A. 151, 176).

employer (Pet. App. A46). The court nevertheless denied relief, because it concluded that the regulation exceeded the Secretary's authority under the Act. The court read the legislative history of the Act as demonstrating that "Congress squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not" (*id.* at A47).

The court of appeals reversed, holding that the regulation is "a reasonable exercise of the Secretary's authority" (Pet. App. A10), and that it "performs a vital function in rounding out the Act's enforcement provisions" (*id.* at A19). The court carefully considered the legislative history upon which the district court relied and concluded that it was not inconsistent with the Secretary's regulation because the proposals rejected by Congress significantly differed from the narrow protection afforded by the regulation (*id.* at A20-A36).[8]

DISCUSSION

This case presents an important and recurring question concerning the extent of the Secretary of Labor's

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[8]Congress failed to enact a so-called "strike with pay" provision. The Secretary's regulation, however, only protects the employee in his refusal to perform a specific hazardous task; the employer may assign available alternative work or refuse to pay the employee if such work is unavailable (Pet. App. A27-A30). Nothing in this record suggests that there was no work available for the disciplined maintenance workers other than the screen cleaning, which was evidently a minor part of their job (see note 4, *supra*).

The congressional rejection of a proposal permitting the closing by administrative order of workplaces presenting an imminent danger to employees was also based on concerns not implicated by the Secretary's regulation--namely, the possibility of "arbitrary governmental authority brought to bear on an employer to take certain action" (Pet. App. A35).

authority under the Occupational Safety and Health Act to ensure the protection of workers faced with imminently dangerous employment conditions. The courts of appeals have disagreed as to the validity of the Secretary's regulation. Although we believe that the court below correctly decided the issue against petitioner, we do not oppose the petition for a writ of certiorari in light of the importance of the question and the conflict among the circuits.

As the court of appeals recognized (Pet. App. A39), its holding is squarely in conflict with that of the Fifth Circuit in *Marshall* v. *Daniel Construction Company*, 563 F. 2d 707, cert. denied, No. 77-1697 (Oct. 2, 1978). The instant decision also conflicts with *Marshall* v. *Certified Welding Corp.*, [1979 Transfer Binder] Empl. Safety & Health Guide (CCH) para. 23,257 (10th Cir. Dec. 28, 1978), in which the court of appeals relied on *Daniel Construction Company* and the district court's opinion in this case. The same issue is currently pending in the Seventh Circuit in *Marshall* v. *N.L. Industries*, No. 78-2289.

The reasons for our conclusions that the question presented by this case is important and that the Secretary's regulation is a valid exercise of his statutory authority are summarized in the petition for a writ of certiorari in *Marshall* v. *Daniel Construction Company*, *supra*.[9] As we observed in that petition (pages 9-10), "a limited right to self-help is necessary to deal with extreme situations for which the administrative and judicial processes are too slow, unless workers are to be left with the cruel choice between their safety and their job."

---

[9]We are sending petitioner a copy of our petition in *Daniel Constuction Company*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN A. CLAUSS
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for Occupational Safety and Health

ALLEN H. FELDMAN
Acting Counsel for Appellate Litigation

DENNIS K. KADE
Assistant Counsel for Appellate Litigation

THOMAS L. HOLZMAN
Attorney

AUGUST 1979

DOJ-1979-08

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1870

WHIRLPOOL CORPORATION,
Petitioner,

vs.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF PETITIONER.

ROBERT E. MANN,
RONALD J. HEIN, JR.,
MARK A. LIES, II,
Attorneys for Petitioner, Whirlpool Corporation.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON,
55 East Monroe Street, Suite 4200,
Chicago, Illinois 60603,
(312) 346-8000,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1870.

WHIRLPOOL CORPORATION,
Petitioner,

vs.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF PETITIONER.

OPINIONS BELOW.

The Opinion of the Court of Appeals and the denial of rehearing and rehearing *en banc* are reported at 593 F. 2d 715 and are reproduced in the Appendix to the Petition for Certiorari[1] at pages A1-A42. The decision of the District Court is reported at 416 F. Supp. 30 and is reproduced in the Appendix to the Petition for Certiorari at pages A43-A49.

1. References to the Certiorari Appendix will be made with the designation ("C.A. ....."). References to the Joint Appendix will be made by the designation ("App. ....."). Reference to the testimony heard by the District Court will be made by the designation (Tr. .....). The parties jointly entered into evidence the transcript of testimony and exhibits entered in an administrative law hearing, *Secretary of Labor* v. *Whirlpool Corporation*, O. S. H. R. C. No. 9224; reference to that record will be made as (Jt. Ex. 1 .....).

JURISDICTION.

The opinion and judgment of the Court of Appeals were entered on February 22, 1979. A timely filed petition for rehearing and suggestion for rehearing *en banc* was denied on April 4, 1979. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1), the Petition for Writ of Certiorari having been filed on June 19, 1979, within ninety (90) days after the Court of Appeals' denial of rehearing.

RELEVANT STATUTE AND REGULATION PROVISIONS.

The relevant statutory provision is Section 11(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U. S. C. § 651 *et seq.*) which provides at 29 U. S. C. § 660 (c)(1):

> "(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding *or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.*" (Emphasis added.)

On January 29, 1973, the Secretary of Labor published a regulation purporting to interpret that portion of the statute quoted above (in particular, the emphasized phrase "any right afforded by this Act"). 38 Federal Register 2681 (January 29, 1973), codified at 29 C. F. R. § 1977.12. In relevant part, the Regulation provides:

> § 1977.12 Exercise of any right afforded by the Act.
>
> (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations

could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perfom normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain a correction of the dangerous condition.

QUESTIONS PRESENTED.

1. Whether the Secretary of Labor exceeded his authority in promulgating a regulation extending protections afforded by Section 11(c) of the Occupational Safety and Health Act of 1970 to employees who refuse to perform assigned work duties.

2. Whether the Petitioner unlawfully disciplined two of its employees for refusing to perform a particular assignment on July 10, 1974.

STATEMENT OF THE CASE.

Petitioner, Whirlpool Corporation (hereinafter "Whirlpool"), operates an appliance manufacturing plant in Marion, Ohio. The workforce numbers approximately 1,500; approximately 88 employees are assigned to various skilled and non-skilled maintenance jobs (Jt. Ex. 1, pp. 457-58).

This litigation was instit ted to challenge disciplinary action taken by Whirlpool against two maintenance employees because they refused to perform a normal plant maintenance work assignment during the night shift, July 10, 1974 (App. 2-4). The two employees were suspended for six hours following their refusal to work and later were issued formal disciplinary notices. Plaintiff seeks recovery of approximately $50.00 lost wages and removal of the disciplinary notices on behalf of the two employees (Tr. 23, 50; App. 3-4).

The refused work assignment was to recover materials from one area of a protective barrier suspended above the plant floor and generally referred to as the "guard screen."

Guard screen is installed in Whirlpool's plant (and generally throughout industry) to protect employees working beneath

overhead conveyors from being struck by materials which occasionally fall off the conveyors (Jt. Ex. 1, pp. 483-85, 499, 521). At the time the work refusal occurred, Whirlpool's guard screen covered 295,000 square feet (approximately 36% of the plant floor space) under a 65,000 linear foot conveyor system (Jt. Ex. 1, pp. 435, 522). At the time this case arose, approximately twenty-five percent 25% of the barrier guard screen in Whirlpool's plant was 16-gauge expanded steel mesh welded into 4′ x 8′ panels constructed of angle iron and reinforced at midpoint by metal strapping (Jt. Ex. 1, pp. 159, 488-94). The angle-iron panels were fastened to adjacent panels by ⅜″ round bolts (Jt. Ex. 1, pp. 492-3). Forty-two percent (42%) of the barrier screen was of the same basic construction but was further reinforced by addtional metal strapping (Jt. Ex. 1, p. 448). Thirty-three percent (33%) was constructed of wire mesh (not expanded steel) and fastened together by spiral wound connectors (Jt. Ex. 1, p. 459).[2] All of the screen panels are supported at six feet eight inch intervals by 2″ x 2½″ or 4″ x 4″ angle iron hangers affixed to the structural steel of the building. The height of the screen above the floor ranges up to twenty feet. Photographs of the barrier screens were introduced as Exhibit R-4, R-5.

The angle iron used for framing screen panels has a rated strength of from 20,000 to 24,000 pounds per square inch (Jt. Ex. 1, p. 494). Professional engineers who tested the strength of the screen mesh as installed in Whirlpool's plant found that the oldest, lightest and least reinforced screen mesh itself supported more than 600 pounds weight applied to a 12-inch area (simulating a human foot) and more than 300 pounds applied to a single point, with no indication of failure (Jt. Ex. 1, pp. 514-19 and associated Exhibit R-11).[3]

2. The latter type screen was being used to replace worn out screens of the former type because it was found to require less maintenance and was at least as sturdy (Jt. Ex. 1, pp. 459, 513).

3. These tests were of the strength of the screen mesh (as opposed to the angle iron frames or the angle iron hangers) and of the
(Footnote continued on next page.)

Maintenance, repair and replacement of the barrier guard screen are responsibilities of the plant Maintenance Department (Jt. Ex. 1, pp. 468-69). Employees of that department collectively average 15-30 hours per week physically climbing, walking or standing on the screen in the performance of that work (Jt. Ex. 1, p. 458). Skilled maintenance employees traversed the entire screen system at least once each month inspecting for defects (Jt. Ex. 1, pp. 208-10, 268-70, 281).

The two complainant employees whose refusal to work on July 10, 1974 gave rise to this case, and other maintenance personnel, regularly were required to clear the guard screen of materials which had fallen from the conveyors (Jt. Ex. 1, pp. 155-58; 173, 179, 209-212, 256, 268-70, 280-81, 468-69). One Complainant, Deemer, had performed that task on a daily basis during the eight-month period preceding July 10, 1974, the date he refused the assignment (Tr. 8, 28). The other Complainant, Cornwell, had retrieved fallen parts from the barrier screen at least once each work shift for several years prior to that date (Tr. 42-43, 54-55; Jt. Ex. 1, pp. 227, 239). Their Foreman, Price, had worked on the screens for seventeen years (Tr. 72-73). A number of other Maintenance Department employees testified that their normal duties also required them regularly to work on the screen structure (Jt. Ex. 1, pp. 154-56, 172, 187, 197-200, 209-10, 250, 267-70, 278-80).

However, neither the Complainants nor any other employee had refused to work on the screen prior to July 10, 1974 (Tr. 28, 58-59, 78-80). No employee other than the Complainants refused to perform work on the screen on that date—two other employees carried out the assignment after the Complainants refused (Tr. 80).[4] No employee including the Complainants has refused to work on the screen since July 10, 1974 (Tr. 56, 85).

(Footnote continued from preceding page.)
welding used to fasten the mesh to the frames (Jt. Ex. 1, pp. 514-19).

4. Both Complainants originally obtained Maintenance Department jobs by voluntary bid and with knowledge that the work in-
(Footnote continued on next page.)

On June 28, 1974 an employee fell from a section of guard screen, and thereby sustained fatal injuries. Following that event —the only major industrial accident to have occurred in the 20-year history of the plant (Jt. Ex. 1, pp. 415-16)[5]—employees temporarily were prohibited from walking on the screen structure pending investigation of the accident and inspection and repair of the screen (Tr. 13). A safety inspector of the Occupational Safety and Health Administration ("OSHA") inspected the guard screen on July 1 and July 5, 1974, following report of the fatality (Jt. Ex. 1, pp. 19-29). The inspector stated, at the conclusion of his inspection, that the accident

> "resulted from a mechanical failure and I can't see what you could have done to prevent it." (Jt. Ex. 1, 461-62, 435.)

Complainant Deemer testified that the temporary prohibition against screen work could not be made permanent; he knew it would be necessary "sooner or later" for him again to walk on the screen in order to retrieve fallen parts (Tr. 13-14, 22). Because he knew it would be necessary to resume guard screen work, Deemer, together with complainant Cornwell, requested to meet with his supervisor and the maintenance superintendent. The requested meeting was held on July 7, 1974, three full days prior to the date of the work refusal. During the meeting, the Complainants protested that the screen was unsafe, but when asked to particularize their concern and/or reconcile it with the fact that they regularly had been working on the

(Footnote continued from preceding page.)
cluded guard screen maintenance; neither sought to leave the department (Tr. 29, 55-56).

5. The record does not support references in the Court of Appeals opinion suggesting that guard screen accidents were common (C. A. 6). What the record does show are three recorded instances of employees falling *on* the screen (Jt. Ex. 1, p. 333 with reference to Exhibits C-7, C-9, C-10) and several recalled but not recorded instances of screen failure; the latter instances were recalled to have occurred in the period 1967-1969, long before July, 1974, and involved screen conditions which no longer existed in 1974 (Jt. Ex. 1, pp. 161-65, 175, 182, 231, 236-38).

screen for a long time, the Complainants stated they felt the work should be done by other, higher paid, employees and not by them (Jt. Ex. 1, pp. 466-68). (The supervisor testified that he understood the Complainants' screen safety comments at the meeting were intended to buttress a claim for more pay (Tr. 81)). At the trial, the Complainants stated that their object in requesting the meeting was to be relieved of guard screen duty altogether and to ask that such work be reassigned to other employees (Tr. 15, 38-39, 45).[6]

The meeting concluded upon the superintendent's reaffirmation that the work was and would continue to be part of the Complainants' jobs. He expressly responded to their questions about the safety of the screen, however, and directed the Complainants and their supervisor jointly to inspect the screen, to identify specific areas which they considered to be unsafe, and, if necessary, to arrange for repair of same (Tr. 15-16, 33, 60). That direction was carried out the next day (Tr. 33).

On July 9, 1974, more than one full day prior to the work refusal,[7] Complainant Deemer telephoned OSHA Area Director Peter Schmidt to ask if he (Deemer) "had to walk on the guard screen" (Tr. 17-18, 38). As noted above, that contact was preceded, on July 1 and 5, 1974, by an inspection of the guard screen conducted by an OSHA safety inspector assigned by the Area Director; the inspector had discussed the condition with the Area Director prior to July 9 when Deemer called (Jt. Ex. 1, pp. 19-29). The Area Director did not, however, initiate a special inspection as is provided for under the Act, Section 8(f), when there are reasonable grounds to believe that an

6. The Complainants' version is inconsistent with other testimony given by them. *I.e.*, Deemer admitted later that he did not think all of the screen was unsafe (Tr. 26). Cornwell admitted the same thing (Tr. 53) and that he was in fact not afraid to walk on properly maintained screen (Tr. 60-62).

7. The Complainants were assigned to work the 11:00 p.m.-7:00 a.m. shift.

"imminent danger" exists; nor did he seek an "imminent danger" shutdown order as is provided for under Section 13 of the Act.[8]

On July 10, 1974, the Complainants' supervisor, acting on instructions given by the maintenance superintendent, personally walked back and forth across the guard screen in an area of the plant known as the bulkhead service line (Tr. 76-78; 85). The supervisor thus walked on the screen for 15 minutes at that time in the presence of the Complainants in order to inspect for defects and to physically demonstrate to them that the screen was safe (Tr. 31, 40, 48, 76-78). The Complainants frequently had walked on that screen in the past (Tr. 54-55). After thus personally testing and inspecting the area, the supervisor assigned the Complainants to clear fallen materials from the area he had just inspected in their presence (Tr. 30, 48-49, 78).[9]

Notwithstanding, the supervisor's physical demonstration of the screen safety (and notwithstanding the prior joint inspection of the screen following the July 7 meeting) the Complainants refused to accept the assignment (Tr. 78). When asked to explain the refusal, Deemer stated that it was unsafe, and when

8. The Area Director did later issue to Whirlpool a citation which alleged the existence of an "unsafe walking/working surface on the screens under the conveyors." Whirlpool successfully contested that citation before an administrative law judge, who twice recommended it be vacated. The administrative proceeding ultimately was concluded by an Order of the Occupational Safety and Health Review Commission dated May 11, 1979. By that Order, the Review Commission overruled two earlier orders entered by the Administrative Law Judge who had vacated the citation and sustained the citation, but directed that the alleged violation be corrected within six months after date of the Order. *Secretary of Labor* v. *Whirlpool Corporation,* 7 OSHC 1356 (BNA, 1979). By an earlier interim ruling, the Commission had found no evidence of violation in connection with the condition which resulted in the fatal accident. *Secretary of Labor* v. *Whirlpool Corporation,* 5 OSHC 1173 at fn. 1 (BNA, 1977). Whirlpool has appealed from the OSHRC decision to the Court of Appeals for the District of Columbia *Whirlpool* v. *O. S. H. R. C.,* No. 79-1692 (D. C. Cir. 1979).

9. The assignment would have required approximately one hour to complete (Tr. 78).

asked what area was unsafe, he replied that it was all unsafe (Tr. 79). Following a second request that the Complainants perform the assignment, and a second categoric refusal, the supervisor took the Complainants to the personnel office (Tr. 22, 48, 80). After hearing the facts, the personnel officer directed that they leave work for the remainder of the shift and report back to the personnel office the following morning. At that time, the Complainants were issued written warnings (Compl. Exs. 1, 2).[10]

Following the refusal by Complainants to clean the bulkhead service line screen, two other employees performed the task without protest (Tr. 80).

Although the Complainants on July 10, 1974 protested that the screen universally was unsafe, they modified their positions at the trial of this case. Under oath, Deemer admitted:

> "I didn't consider everything unsafe, all the guard screen unsafe. I made a statement to [that] effect . . . but I was a little hot under the collar at the time." (Tr. 26),

and

> "My being mad is why I made the statement that all the guard screen was unsafe and I wouldn't walk on it that night." (Tr. 36).

Complainant Cornwell admitted:

> Q. "Mr. Cornwell, did you consider the guard screens in the whole plant to be unsafe?
> A. "No, I really didn't. (Tr. 53),

* * * * *

10. The warnings stated:

"At approximately 11:30 P.M., last night, you were assigned the task of cleaning parts off the bulkhead service line guard screen. Even though your Foreman, Gale Price, personally checked the guard screen to insure that the task could be performed safely, you refused to perform the designated work, even though you have been performing this same task for approximately one year. This refusal to perform designated work is a violation of policy 10.13(h) of *A Statement of Wages, Hours and Working Conditions.*"

Q. "Are you opposed per se to working on the guard screen?

A. "No. (Tr. 60),

* * * * *

Q. "As evidenced by your continuing activities on the guard screen, you are not opposed to walking on all three types of guard screen if it is properly maintained, is that correct?

A. "Yes." (Tr. 61)

The entire guard screen system regularly (at least once a month) was traversed by a skilled maintenance employee who inspected for defects (Jt. Ex. 1, pp. 208-10). Other skilled employees also were responsible to inspect for and to repair screen defects (*e.g.*, Jt. Ex. 1, pp. 268-70, 281). In addition, Whirlpool was implementing a screen replacement program at the time of the events described above (Jt. Ex. 1, pp. 223, 459, 513).[11]

A number of employee witnesses who testified in the citation proceeding, and who frequently work on the guard screen stated that they believed the screen to be safe (Jt. Ex. 1, pp. 165, 168, 183, 211-12, 281-82, 287-88).

The Secretary instituted this action pursuant to Section 11(c)(1) of the Occupational Safety and Health Act of 1970 and regulations promulgated thereunder. Section 11(c) prohibits an employer from discharging or in any manner discriminating against any employee "because of the exercise by such employee . . . of any right afforded by this Act."[12] The Secretary

11. Indeed, after their refusal to work, both Complainants applied for jobs associated with that program (Tr. 25-26; 51). One was successful; the other was unsuccessful because of relative seniority (Tr. 25-26; 51-53).

12. "Section 11(c)(2) of the Act, 29 U. S. C. 660(c)(2), in pertinent part, provides that:

> "[A]ny employee who believes he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

(Footnote continued on next page.)

alleges that Whirlpool unlawfully disciplined the Complainants for refusing to clean the guard screen on July 10, 1974. The Secretary has argued that the Complainants' asserted belief that the screen was unsafe served to insulate them against disciplinary action imposed by Whirlpool for refusing to perform the work because such refusal was an exercise of a "right afforded by this Act" within the meaning of Section 11 of the Act as construed by the Secretary's regulation, quoted above.

The District Court entered judgment for Whirlpool based upon the conclusion "that the regulation in question is clearly inconsistent with the statute and therefore invalid" (C. A. at A47). The District Court stated that "[t]he reason for this holding is that the Congress squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not" (C. A. at A47).

On appeal by the Secretary, the Court of Appeals for the Sixth Circuit observed that "[t]wo district courts below ruled that this regulation is invalid because it has no statutory support and because OSHA's legislative history reveals Congressional intent at odds with the regulation" (C. A. at A2).[13] The Court of Appeals, however, was unpersuaded by the District Court decisions and reversed those judgments based upon the twofold

(Footnote continued from preceding page.)

> "The Secretary shall cause such investigation as he deems appropriate. If . . . the Secretary determines that . . . this subsection ha[s] been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the . . . courts shall have jurisdiction . . . to restrain violations of [11(c)(1)] and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

13. The Secretary's appeal of the District Court's decision to the Sixth Circuit was consolidated with his appeal from two other District Court decisions adverse to his position. *Brennan* v. *Diamond International Corp.*, 5 OSHC 1049 (BNA S. D. Ohio, 1976); and *Brennan* v. *Empire-Detroit Steel Division, Detroit Steel Corporation*, No. C-1-74-345 (S. D. Ohio, 1976). The Secretary later dismissed his appeal in the *Diamond International* case.

finding "that the Secretary's regulation is consistent with the stated purposes of the Act and its legislative history, and that it represents an appropriate employment of the regulation power conferred upon the Secretary by Statute . . ." (C. A. at A2).

The Court of Appeals then remanded the case to the District Court for further proceedings consistent with its opinion.

SUMMARY OF ARGUMENT.

The Act does not expressly afford employees a protected right to refuse work. Congress squarely was presented with a legislative option to extend the protections of the Act to work refusals or stoppages, but rejected all such proposals.

Congress did include within the Act a mechanism to deal with conditions which employees may believe to be imminently dangerous, which mechanism the legislative history clearly shows was adopted in lieu of proposals to protect employees who refuse work for reasons of safety or health.

The Secretary's regulation, purporting to extend the protections of the Act to employee work stoppages, is therefore plainly inconsistent with the will of Congress as expressed in the Act and legislative history. In turn, the Court of Appeals' finding that the Secretary's regulation is consistent with the Act and with Congressional intent as manifested in the legislative history is clearly erroneous as a matter of law. The Court has disregarded the established principle that a patent inconsistency between a regulation and a statute must be resolved in favor of the statute. It has ignored the principle repeatedly recognized by this Court, that a legislative choice to create one form of remedy implies that a decision has been made to exclude other forms of remedy.

Indeed, the Secretary's own intepretation of Section 11(c)(1) begins with the revealing admission that "[r]eview of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 C. F. R. 1977.12 (b)(1), *supra* (C. A. at A56-7).

The Court's decision proceeds from complete disregard of the facts set forth in the record. It fails to recognize that the Secretary's regulation not only is inconsistent with all recorded expressions of Congressional will, but also clearly provides the basis for potential abuse, setting up the potential for endless litigation in Federal Courts over labor matters otherwise relegated to other forums.

The Court of Appeals misstated and/or ignored the undisputed facts of the case to an extreme degree in order to create a factual justification for its decision. The Court created an urgent, no-recourse situation where none existed in fact. Based upon the record facts, the Court should have dismissed the complaint for failing to establish the elements essential to obtaining protection under the regulation.

ARGUMENT.

I.

THE OCCUPATIONAL SAFETY AND HEALTH ACT DOES NOT EXPRESSLY PROTECT EMPLOYEES FROM THE EMPLOYMENT CONSEQUENCES OF REFUSING TO PERFORM WORK.

The Secretary admits within his regulation that no provision in the Act expressly affords employees the right to refuse work assignments without regard to the employment consequences of such actions 29 C. F. R. § 1977.12(b)(1), *supra.* Thus, the question to be resolved is whether the Secretary may create such a right by administrative fiat.

Section 11(c) of the Act protects an employee from discriminatory action if he is in the exercise of "any right afforded by this Act." Section 11(c)(1) itself creates one of these rights, *i.e.* the right to file a complaint or institute a proceeding under the Act or give testimony in such a proceeding. The Act elsewhere creates numerous other rights *vis a vis* their employers:

1. the right to receive notice of application for a variance from a standard (Sections 6(b)(6)(a) and 6(d), 29 U. S. C. § 655(b)(6)(A) and 655(d));

2. the right to petition for a hearing on an application for a variance (Sections 6(b)(6)(A) and 6(b)(6)(B), 29 U. S. C. § 655(b)(6)(A) and 655(b)(6)(B));

3. the right to participate in hearings on application for a variance (Section 6(d), 29 U. S. C. § 655(d));

4. the right to apply for modification or revocation of a rule or order granting a variance (Section 6(d), 29 U. S. C. § 655(d));

5. the right to challenge the validity of a standard issued by the Secretary (Section 6(f), 29 U. S. C. § 655(f);

6. the right to be advised of citations issued (Section 9(b), 29 U. S. C. § 658(b));

7. the right to contest a hazard abatement period set by the Secretary (Section 10(c), 29 U. S. C. § 659(c));

8. the right to participate as parties in hearings on citations (Section 10(c), 29 U. S. C. § 659(c));

9. the right to petition the court of appeals to review final orders of the Review Commission (Section 11(a), 29 U. S. C. § 660(a)).

The Act also creates employment rights in connection with provisions for compliance and "imminent danger" inspections. Such rights include a right to be informed that an inspection is underway (Section 8(c)(3); 29 U. S. C. § 657(c)(3)); a right to notify inspectors of violations (Section 8(f)(2); 29 U. S. C. § 657(f)(2)); a right to request special inspections (Sections 8(f)(1) and 13(c), 29 U. S. C. §§ 657(f)(1) and 662(c)); a right to consult privately with inspectors (Sections 8(a)(2) and 8(e), 29 U. S. C. §§ 657(a)(2) and 657(e)); and right to accompany inspectors (Section 8(e), 29 U. S. C. § 657(e)).

With respect to imminent dangers, the Act requires OSHA to conduct a prompt investigation upon the request of an employee, to inform the employee promptly as to the result of such investigation, and, if necessary, to obtain judicial intervention (Section 8(b)(1), 29 U. S. C. § 657(b)(1)). If the Secretary fails to seek judicial relief from an imminent danger, the employee may bring his own action in federal court. (Section 13(d), 29 U. S. C. § 662(d)).

The fact that so many rights are set forth in the Act reveals that Congress gave great consideration to employee rights in its deliberations. Accordingly, the absence of a provision granting

employees the right to refuse to perform assigned tasks without resort to expressly established statutory procedures clearly is reflective of a Congressional intent not to legislate immunity from a work assignment refusal or to give employees a right to shut down jobs. Indeed, the Act withholds that right from even the inspectors or the Secretary himself, and gives it only to the federal courts.

Nor can it be argued that the right extended to employees in the Secretary's regulation is merely "incidental." To afford individual employees absolute immunity—in terms of pay or discipline—from the effects of refusing a work assignment would reflect monumental change in prevailing labor policy. This entire area is part and parcel of the National Labor Relations Act, as amended, where it is the subject of express legislation. For example, employees may not be fired or disciplined for engaging in a strike under Section 7 of the NLRA, which grants employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." An employer commits an unfair labor practice under Section 8(a)(1) of the NLRA when it interferes with, restrains or coerces employees in the exercise of their Section 7 rights. These rights include the right to strike over safety hazards without reprisal. *See NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962).

Furthermore, Section 502 of the Labor-Management Relations Act, 29 U. S. C. § 143, provides:

> "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter."

As recognized by the Supreme Court in *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U. S. 368, 385 (1974), Section 502 provides a limited exception to any express or implied no-strike obligation, allowing employees to walk out in

abnormally dangerous situations without triggering a suit for contract breach or for injunction. *See also NLRB* v. *Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1957).

But neither of these two sections has ever been construed to create a right to refuse work without loss of pay.[14] To allow employees to withhold services without loss of pay would be to remove employee-employer disputes from the collective bargaining arena envisioned by the NLRA. Labor unions would thereby be possessed of an economic weapon which employers could not hope to match and which was never intended under the NLRA. The Secretary's regulation invites continuous labor unrest under the pretext of an OSHA-related strike.

The absence of any express provision in the OSH Act dealing with refusal to work, the inclusion of numerous other protected employee activities, and the express provisions on work refusals in other legislation, clearly indicates that Congress did not intend to create a protected right to refuse work as part of this legislation.[15]

14. There is no merit in the Court's attempt to distinguish the Secretary's regulation from the "strike with pay" provision which was rejected by Congress (C. A. at A26-A29, A35). Indeed, the Court's conclusion that an employee must be prepared to forego pay if necessary to escape the hazard (C. A. at A36) is completely contradictory to the interpretation of Section 11(c)(1). Clearly, if the employee has a "right" to refuse to work because he believes that there is a hazard, denial of pay would certainly be considered discriminatory under Section 11(c)(1).

15. The Court of Appeals relied upon the Federal Mine Safety and Health Amendments of 1977, 91 Stat. 1290, 30 U. S. C. § 801, *et seq.*, in upholding the Secretary's regulation. The Court stated (C. A. at A36-37):

> "Our conclusion is reinforced because when Congress subsequently directly addressed this question, when considering the Federal Mine Safety and Health Amendments of 1977, 91 Stat. 1290, 30 U. S. C. § 801 *et seq.*, it expressly indicated that a miner could refuse to work if he had a good faith belief that his job would subject him to unsafe or unhealthful working conditions. As here, the Mine Safety and Health Act does not expressly provide for that right." (Footnotes omitted.)

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II.

THE OCCUPATIONAL SAFETY AND HEALTH ACT DOES NOT IMPLIEDLY PROTECT EMPLOYEES FROM THE EMPLOYMENT CONSEQUENCES OF REFUSING TO PERFORM WORK.

A. Congress Squarely Was Presented with Proposals to Protect Safety-Related Work Refusals and Decided Not to Include Work Refusals as a Right Protected by the Act.

The Secretary's regulation (29 C. F. R. § 1977.12(b)(1)) acknowledges that the legislative history[16] indicates that Congress did not intend to protect employees in refusing work assignments. The Secretary now contends, however, that nothing in that history counter-indicates the existence of that right. However, the legislative history of this Act clearly reveals that Congress did squarely consider and did ultimately reject the proposition.

The history of the Act began in the Senate with introduction of Senate bill S. 2193 (the "Williams" bill) which was favored by organized labor and which ultimately proved to be the precursor of the final legislation, and with introduction of Senate bill S. 2788 (the "Administration" bill).[17]

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However, the Court's reliance upon the 1977 Amendments to the Federal Mine Safety and Health Act is misplaced. If Congress intended to extend the same right of refusal to the Occupational Safety and Health Act, it would have included such a right in the Act as originally enacted or simply amended the Act to provide such a right.

16. The legislative history of the Act is found in Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print June, 1971), referred to in this brief as "Leg. Hist." The Senate report and the Senate-House Conference report are also found in U. S. Code Cong. Admin. News, 91st Cong., 2d Sess. 5177-5241 (1970).

17. The concept of a federal Occupational Safety & Health Act germinated during the Johnson Presidency, but the bill put

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Apropos the question of work place shut down and/or cessation of work, the Williams bill originally would have given the Secretary of Labor authority to issue an immediate stop-work or shut-down order where an "imminent danger" existed, provided there was not time to obtain a court order. In contrast, the Administration bill proposed a National Occupational Safety & Health Board to write standards, which would be enforced by the Secretary, who would bring his complaint before the Board, which would order compliance if a violation was found. The Board's order would be enforced by court action, upon the initiative of the Secretary.

In the House of Representatives, four bills were introduced: the Administration bill (H. R. 13373), Leg. Hist. at 679-699, Representative William Hathaway's bill (H. R. 843), Leg. Hist. at 610-611, Representative James O'Hara's bill (H. R. 3809), Leg. Hist. at 640-641, and Representative Carl Perkins' bill (H. R. 4294), Leg. Hist. at 664-665. The House Administration bill differed from the Hathaway, O'Hara and Perkins bills by placing standard setting and enforcement power in an independent Board instead of with the Secretary of Labor, and required the Secretary to resort to the courts in imminent danger situations, H. R. 13373, §§ 8(b), (d), Leg. Hist. at 697-699; conversely, the three other bills authorized administrative issuance of cessation-of-work orders. H. R.843, § 6(a)(2), Leg. Hist. at 610-611; H. R. 3809, § 6(a)(2), Leg. Hist. at 640-641; H. R. 4294, § 6(a)(2), Leg. Hist. at 664-665.

Extensive hearings were conducted in each chamber. Among those offering testimony were Secretary of Labor George P. Schultz, Undersecretary of Labor James Hodgson, and Labor

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forward by that Administration in 1968 failed to win support. The following year, President Nixon proposed new legislation. See generally: Brown, *A Law is Made—the Legislative Process in the Occupational Safety & Health Act of 1970,* 25 Labor L. J. 595, 598 (Oct. 1974).

Solicitor Lawrence Silberman, who principally were responsible for preparation of the Administration's proposals.[18]

In testimony before the House Labor Committee, Secretary Schultz expressly defended those provisions of the Administration bill which required resort to the District Courts in imminent danger situations as offering a more acceptable solution than § 6 of the Perkins bill, H. R. 4294, and similar proposals (*supra*), which would have authorized the inspector to issue a "stop order" on the scene. Secretary Schultz argued that in most cases the employer would voluntarily correct the problem, and that any recalcitrant employer who might refuse to take steps when the situation was pointed out would most likely not honor an inspector's cessation-of-operations order, so that resort to court proceedings would be necessary in any event. Secretary Schultz urged instead that an inspector's request, backed by the implicit threat of immediate litigation, would not only be more palatable to the business community, but also more likely to secure voluntary, and therefore speedier, removal of the hazard with less opportunity for loss of life or limb. *Hearings before the House Select Subcommittee on Labor,* at 400.

In contrast, I. W. Abel, President of the Industrial Union Department, AFL-CIO, who was accompanied by Jacob Clayman, Administrative Director, I. U. D., AFL-CIO, testified before the same Committee in favor of the O'Hara bill, H. R.

18. Testimony of Honorable George P. Schultz, Secretary of Labor, Honorable James Hodgson, Undersecretary of Labor, and Lawrence Silberman, Solicitor, Office of the General Counsel. Hearings before the Select Subcommittee on Labor of the Committee on Edudcation and Labor, House of Representatives, 91st Cong., 1st Sess., at 111-441 (September 24, 1969); Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, Senate, 91st Cong., 1st Sess., at 76 (September 30, 1969).

19. Hearings before the Select Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 91st Cong., 1st Sess. (September 30, 1969); Testimony of Jacob Clayman, Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, Senate, 91st Cong., 1st Sess. (November 26, 1969).

3809, and against the Administration bill.[19] Mr. Abel pointedly contrasted the O'Hara bill which "would permit the Secretary of Labor to order an immediate halt to such an operation and removal of all workers from the location except those assigned to remove or correct the dangerous situation," with the Administration bill which would require the Secretary to seek a temporary injunction, a procedure which Mr. Abel branded as "far more subject to fatal delay, such as finding a judge on a summer Sunday." *Hearings, supra,* at 655; Testimony of Jacob Clayman, Subcommittee on Labor (Senate), at 428-9, 435-6.

Thus, it is apparent that neither the Secretary nor the Industrial Union Department considered that any of the proposed bills would give employees the right, on their own initiative, to remove themselves from danger pending administrative or court-ordered relief. Nor did any member of the subcommittee call this possibility to their attention. In similar circumstances, this Court recently observed:

> "Although the transcript of the House Committee hearings does not indicate that any Committee member voiced explicit affirmative agreement with this interpretation, it is surely most unlikely that the members of the Committee would have stood mute if they disagreed with it." *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U. S. 453, 460 (1974).

1. House Action.

The House Education and Labor Committee ultimately reported out a bill, H. R. 16785, 91st Cong., 2d Sess. (1970), Leg. Hist. at 726. See H. Rep. No. 91-1291, 91st Cong., 2d Sess. (1970), Leg. Hist. at 831. This bill was sponsored by Representative Daniels, Leg. Hist. at 721, (the "Daniels bill).

The Daniels bill as reported compromised on the imminent danger issue by providing that the Secretary's inspectors were empowered to "issue an order prohibiting the employment or presence of any individuals in locations or under conditions

where such an imminent danger exists, except to correct or remove [the danger]." H. R. 16785, § 12(a), Leg. Hist. at 955. The inspector's cessation order would remain in effect for no more than five days. *Id.;* Leg. Hist. at 955-956. Resort to the District Court would be necessary to obtain longer relief. § 12(b), Leg. Hist. at 956. The bill also provided that if the Secretary "arbitrarily or capriciously . . . fails to issue an order 'in an imminent danger situation' and 'any person is injured . . . physically . . . by reason of such . . . failure to issue such order,' " such "person may bring an action against the United States in the Court of Claims in which he may recover the damages he has sustained. . . ." § 12(c), Leg. Hist. at 956-57.

Secondly, the Daniels bill contained an elaborate provision which became known as the "strike-with-pay" clause. This provision would have required employers to take specified steps to assure that no employee would suffer an impermissible exposure to toxic substances ". . . unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period." § 19(a)(5), Leg. Hist. at 969-70. The Committee justified this provision of the Daniels bill by saying that "[t]here is still a real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay." H. R. Rep. No. 91-1291 at 30, Leg. Hist. at 860.

When the Daniels bill reached the floor of the House, its critics offered another bill, H. R. 19200, 91st Cong., 2d Sess. (1970), which was introduced by Representative Steiger as an amendment in the nature of a substitute, H. Res. 1218, 91st Cong., 2d Sess. (1970), Leg. Hist. at 977 (the "Steiger" bill). Under the Steiger bill, only the federal courts would have power to issue immediate-cessation orders in imminent danger situations. H. R. 19200, § 12, Leg. Hist. at 796-98. It did not contain the controversial "strike-with-pay" provision.

To counter support for the substitute Steiger bill, Representative Perkins, Chairman of the House Education and Labor Committee and floor leader for the Daniels bill, stated that if the Steiger bill were defeated he would offer a series of amendments compromising several of the most controversial features of the Daniels bill. 116 Cong. Rec. 38369, Leg. Hist. at 985-987. The offered amendments would (1) require the Secretary to seek a court order to bring about a shutdown of operations and (2) delete the "provision that would have permitted an employee to absent himself from exposure to a toxic substance without loss of pay, the so-called 'strike-with-pay' provision." 116 Cong. Rec. 38369, Leg. Hist. at 986 (Perkins); 116 Cong. Rec. 38376, Leg. Hist. at 1005 (Daniels).

Some of the Daniels bill proponents were opposed to the compromise amendments. Thus, Congressman Cohelan urged:

> "[A] comprehensive occupational safety and health program must be based on the individual rights of the worker. It must permit the worker to leave his post whenever and wherever conditions exist that endanger his health or safety. The worker must be guaranteed procedural safeguards in order to take corrective action in removing such dangers. Therefore, passage of this measure before this Chamber today is vital and necessary as all of these aspects of a comprehensive safety and health program as provided for in H. R. 16735." 116 Cong. Rec. 38375, Leg. Hist. at 1001.

Others continued to urge passage of the Steiger bill notwithstanding the Daniels bill amendments. "[E]ven if the amendments offered by [Congressman Daniels] are passed, you still do not have a perfect bill." 116 Cong. Rec. 38708, Leg. Hist. at 1073 (Steiger). Representative Steiger further stated:

> "Let me emphasize again, *there is nothing in our bill which authorized strikes without pay.*" (Emphasis supplied.) 116 Cong. Rec. 38708, Leg. Hist. at 1074.

Thus, the debate in the House of Representatives reveals that Congress was in fact presented with a clear policy choice with

respect to protecting employees' refusals to perform work, did thus consider the situation at issue in the case at bar, and rejected the philosophy which now is embodied in the Secretary's regulation.[20]

As the final vote drew near, Daniels offered a set of five amendments to his bill and, in relevant part, described them as follows:

> "What do these amendments do?
>
> * * * * *
>
> *"Second, in imminent danger situations, the Secretary will now be required to get judicial relief. We have eliminated the provision under which a plant could be closed by an administrative order.*

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20. It is important to note that the Court of Appeals relied very heavily on the fact that its review of the legislative history did not disclose any reference to strike *without* pay. As the Court stated in Footnote 35 of its opinion (C. A. at A27):

> "We consider it significant that every time that the question of employees walking off the job was addressed, it was always in the 'with-pay' context . . ."

The Court did not attempt to reconcile that view with existence in the legislative history of Representative Steiger's comments that his bill, which formed the basis of the Act, did not authorize strikes *without* pay or with Representative Cohelan's comments with reference to the right of workers to walk off the job in any and all situations where they were exposed to danger. The Court's decision obviously is predicated on a view that Congress *should* have given employees the right to walk off the job. This influence on the Court's decision can best be seen by an examination of Footnote 22 (C. A. at A18) of its opinion where the Court attempted to rationalize the implication of a common law right on behalf of an employee faced with an imminent danger situation notwithstanding that Section 4(b)(4) of the Act expressly provides that nothing in the Act shall be construed "to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." The Court's apparent willingness to imply such a right in the face of such clear Congressional language is ample testimony to its willingness to construe the statute and the legislative history to meet its own ideas of what the Congressional policy *should* have been. A fair reading of the legislative history shows that Congress did not intend to protect workers who refuse to work.

"Third, we have deleted a provision which was—though inaccurately—called a 'strike with pay' provision and have provided that employees may request an inspection when they are subjected to dangers at the workplace." (Emphasis supplied 116 Cong. Rec. 38707, Leg. Hist. at 1071.

In addition, Representative Daniels inserted the following statement in the Congressional Record:

"Request for Inspection Amendment

"1. *Explanation:*

This amendment provides that employees may request an inspection by giving the Secretary written notice of the safety violations that threaten physical harm or imminent danger. The amendment requires the Secretary to make a special inspection as quickly as possible if he concludes that there are reasonable grounds to believe that such danger exists.

"2. *Justification:*

This amendment is a substitute for the provision in Section 19 of the committee bill permitting employees to absent themselves from dangerous situations without loss of pay. When we get to Section 19 I will offer an amendment to delete that provision.

"The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. *We have no provision for payment of employees who want to absent themselves from risk of harm; instead we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly.* Instead of making provisions for employees when their employer is not providing a safe work place, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm." (Emphasis supplied.) 116 Cong. Rec. 38377-38378, Leg. Hist. at 1008-1009.

Despite these assurances that the Daniels bill no longer contained a right to refuse work provision, the House voted 220-172, to adopted the Steiger bill, *which did not at any time include a work refusal provision.* 116 Cong. Rec. 38723 Leg. Hist. at 1112-15. The amended bill then passed by an overwhelming vote of 383 to 5. 116 Cong. Rec. 38724, Leg. Hist. at 1115-16.

2. Senate Action.

The Senate Committee on Labor and Public Welfare reported out a revised version of the Williams bill on October 6, 1970. As reported, the Committee bill did not contain a "strike-with-pay" provision. Instead, it provided that in imminent danger situations, an employee had the right to make a written request for an immediate inspection. S. 2193 § 8(f)(1), Leg. Hist. at 252-53. The inspector, however, was given authority to issue an immediate 72-hour cessation-of-work order under that proposal. *Id.*, § 11(b), Leg. Hist. at 262-63. If the inspector arbitrarily refused to issue such an order, the employee was given the right to bring an action in the District Court for a writ of mandamus to compel the Secretary to issue a cessation-of-work order and for other appropriate relief. § 11(c), Leg. Hist. at 264.

Debate on the Committee (Williams) bill opened in the Senate with remarks by its sponsor, who made a brief presentation of the bill's features. 116 Cong. Rec. 37324-27, Leg. Hist. at 411-419. With respect to the Committee bill's treatment of employees' right to walk off the job, Senator Williams stated:

"I should also add, despite some widespread contentions to the contrary, that *the committee bill does not contain a so-called strike-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection.*" 116 Cong. Rec. 37326, Leg. Hist. at 416.

As in the House, having failed to obtain Committee endorsement of its original proposal, the Administration put forward a compromise bill (S. 4404), which was sponsored by Senator Peter Dominick. S. 4404, 91st Cong., 2d Sess. (1970), Leg. Hist. at 73. Senator Williams addressed the difference in approach to the imminent danger shutdown question taken by his bill and the Administration's compromise bill:

> "The committee bill, while guarding against frivolous complaints, permits employees or their representatives to request inspections where they believe that a violation of a safety and health standard exists that threatens physical harm or that an imminent danger exists.
>
> "The substitute bill has absolutely no comparable provision *for what in so many clearly life and death instances is the minimum assurance to which the employee is entitled.*" (Emphasis added.) 116 Cong. Rec. 37340-41, Leg. Hist. at 432-433.

In short, Senator Williams took the position that the Act should provide at least this "minimum assurance"—in view of the fact that the Act would not contain the greater assurance of an employee right-to-leave the danger area.

Senator Williams also stressed the differing approaches of the committee bill, which bore his name, and the Administration bill, which had the support of the Secretary of Labor, on the issue of who should have authority to issue stop-work orders:

> "The committee bill also permits the Secretary if he determines that the danger of death or serious harm is so immediate that action must be taken without awaiting the institution of court proceedings, to order such action to be taken and his order may remain in effect for 72 hours.
>
> "This is one of the areas in which there is clearly a distinction between the bill as reported by the committee and the substitute proposed. These are the true emergency situations where time manifestly is of the essence.
>
> * * * * *

> "The substitute's limitation on the Secretary's freedom to act fails to consider that the time consumed in unnecessary legal steps may be the difference between life and death of the worker.
>
> "It is obvious that in most cases, employers will recognize the gravity of the danger and will voluntarily close down a machine or a process.
>
> "However, in those few cases where the employer refuses, it is imperative that the Secretary retain this important authority.
>
> "To repeat, in most cases the employer would or will recognize the gravity of the danger and, we would think, would voluntarily close down; but in those cases where that does not happen, the Secretary, under the committee bill, retains this most important authority." *Id.*

Thus, as debate progressed, all proposals for protected work refusals were abandoned in favor of expedited inspections by federal officers.

The Senate Labor Committee's bill, sponsored by Senator Williams, passed the Senate by an overwhelming 83-3 roll call vote. 116 Cong. Rec. 37632, Leg. Hist. at 528.

3. Conference Committee Action.

In the House-Senate conference, the Senate was largely successful in retaining the provisions of the Williams bill. In particular, the Senate conferees successfully obtained House acquiescence in the request for inspection provision, which created an employee right to trigger an immediate inspection in imminent danger situations—although this right had been specifically rejected in the House. The Senate receded, however, on the issue of whether the Secretary should have the power to issue cessation-of-work orders in imminent danger situations, agreeing to the House version giving such power only to the federal courts.

The Senate accepted the conference report by voice vote on December 16. 116 Cong. Rec. 41764, Leg. Hist. at 1150 The

House likewise accepted the Conference Report on the following day, by a 309-60 roll call vote. 116 Cong. Rec. 42209, Leg. Hist. at 1225-28.

The legislative history of this Act thus demonstrates conclusively that both houses of Congress expressly considered but rejected proposals to create a protected right for employees to quit work as a means of furthering the legislative scheme. Congress instead adopted the request-for-inspection provision, backed up with potential federal court intervention at the behest of employees or the Secretary. The Court of Appeals' conclusion that the Act contains an implied protected right to refuse to work utterly disregards the clear intent of Congress to avoid creating just such a right. That intent is manifest from the statement of Senator Williams and from the concessions of Representative Daniels. To repeat the statement made by Representative Daniels as he tried to persuade the House to pass his bill, which he had offered to amend to conform much more closely to the Act as it finally emerged from Congress:

> "We have no provision for payment of employees who want to absent themselves from risk of harm; *instead we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly.*" (Emphasis added.)

The Secretary attempts within his regulation to deal with an urgent situation where resort to the statutory procedure may be insufficient. As the legislative history shows, however, Congress rejected entirely and categorically all proposals to protect work refusals. The regulation thus flies directly in the face of Congressional intent, however limited in scope the Secretary intended it to be.

The Court of Appeals has also ignored the well-reasoned decisions of two other Circuit Courts of Appeals and several District Courts. In *Marshall* v. *Daniel Construction Co.*, 563 F. 2d 707 (5th Cir. 1977), *cert. denied*, ... U. S. ....., 99

S. Ct. 216 (1978), the Fifth Circuit Court of Appeals held that the Secretary exceeded his authority in promulgating the regulation, reasoning from the Act's legislative history that Congress did not intend employees to have the right to refuse work assignments. In striking down the Secretary's regulation, the Court stated:

> ". . . it expressly confers upon employees a right that Congress deliberately chose not to grant to OSHA inspectors: the right to determine in fact that an employment practice or condition presents 'a real danger of death or physical injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory procedures.' 29 C. F. R. § 1977.12(b)(2) (1976). Moreover, by permitting employees to refuse work upon making such a determination, the regulation provides them authority equivalent to that of an OSHA inspector when issuing an administrative stop work order—a right which Congress also deliberately withheld from OSHA inspectors. A worker's abuse of the authority afforded under the regulation could disrupt or cripple an employer's business. The legislative history is manifest that Congress feared such a result. We hold that the regulation exceeds the Secretary's scope of authority to promulgate regulations as granted under the Act." (Footnote deleted.) 563 F. 2d at 714-15.

In *Marshall* v. *Certified Welding Corp. and Wycon Chemical Corp.*, 7 OSHC 1069 (BNA, 10th Cir. 1978), the Tenth Circuit Court of Appeals upheld a district court ruling that the discharge of an employee for refusing to work in an area be believed to be unsafe did not create a cause of action under the Act and could not be considered a protected activity. Several District Courts have similarly held the Secretary's regulation to be contrary to express Congressional intent and, therefore, invalid. *Alders* v. *Kennecott Copper Corp.*, No. 76-292-M (D. N. M. 1976); *Brennan* v. *Diamond International Corp.*, 5 OSHC 1049 (BNA S. D. Ohio 1976); *Brennan* v. *Empire-Detroit Steel Division, Detroit Steel Corp.*, No. C-1-74-

345 (S. D. Ohio 1976), *rev'd sub nom., Marshall* v. *Whirlpool Corporation and Empire-Detroit Steel Division, Detroit Steel Corp.*, 593 F. 2d 715 (6th Cir. 1979); *Usery* v. *Whirlpool Corporation*, 416 F. Supp. 30 (N. D. Ohio 1976); *rev'd sub nom., Marshall* v. *Whirlpool Corporation and Empire-Detroit Steel Division. Detroit Steel Corp.*, 593 F. 2d 715 (6th Cir. 1979); *cert. granted*, 48 U. S. L. W. 3188 (1979).

B. Rules of Statutory Construction Militate Against Implication of the Right Which the Secretary Seeks to Create.

The well-established principle of statutory construction "expressio unius est exclusio alterius" holds that "a 'legislative affirmative description' [of certain powers] implies denial of the non-described powers," *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 533 (1942), *citing with approval Durousseau* v. *United States*, 6 Cranch (U. S.) 307, 314 (1810); that "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode," *Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289 (1929); and that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies," *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U. S. 453, 458 (1974).

Applying this rule of statutory construction to the scheme of rights and procedures contained in the Act, it can be seen that the Act specifically describes the rights and powers of the employee, the Secretary, and the federal court in situations allegedly involving danger in the workplace. The employee is empowered to request an inspection, the Secretary is to decide whether the situation should be brought to the attention of the federal district court, and the court is to shut down operations if necessary. The Act limits the shutting down of operations in imminent danger situations to be done only in this particular way. The Act does not create a protected employee right to shut

down operations on his own, and expressly provides that his particular right is to set in motion the imminent danger proceduce which, if necessary, will result in a court-ordered shutdown of business operations.

The absence of a protected right to walk off the job is balanced in the Act by the presence of the provisions which directly involve the employee in almost every aspect of the Act's administration and explicitly protect him for exercising his right to be involved, especially the provision which makes the employee the one who sets in motion the Act's imminent danger procedure. In this regard it is further submitted that the right which the Secretary asks this Court to find implicit in the Act—that an employee has the right to shut down the employer's operations on his own and that the employer is required to continue paying him—would completely disrupt the careful scheme of the Act's request for inspection and imminent danger provisions. The end result of the argument advanced by the Secretary would be that employees, as well as federal judges, would have the power to shut down operations. Such a result cannot be found by implication within the four corners of the Act without total disruption of its carefully constructed scheme and, as noted above, serious disruption of the NLRA.

While it is true that an administrative regulation ordinarily is entitled to judicial deference and carries great weight, *e.g., Udall* v. *Tallman*, 380 U. S. 1 (1965), it is equally true that if a regulation is clearly inconsistent with the statute, the regulation is entitled to no deference, carries no weight, and must be found invalid. As this Court observed in *Manhattan General Equip. Co.* v. *Commissioner*, 297 U. S. 129, 134 (1936):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. . . ."

See, also United States v. *Larionoff*, 431 U. S. 864, 873 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 213-214 (1976); *Dixon* v. *United States*, 381 U. S. 68, 74 (1965).

Creation of a protected right to withdraw from work unquestionably would be an awesome legislative decision. Since Congress squarely considered and expressly rejected inclusion of such a right under the protections of the Act, but instead enumerated diverse other, less awesome rights, it is inconceivable that the Secretary's and the Court of Appeals' position accords with Congressional intent.

III.

THE LOWER COURT'S FAILURE CORRECTLY TO TAKE ACCOUNT OF THE FACTS DEMONSTRATES ITS OWN RESERVATION ABOUT THE LEGALITY OF THE DISPUTED REGULATION.

The Court of Appeals, with obvious concern about the legislative history, attempted to rationalize its decision and justify the regulation by finding the regulation to be merely a facilitation of the admittedly protected employee right to invoke special inspection procedures afforded under Section 8(f) of the Act. Thus, in its interpretation of the regulation's application, the Court held:

> "[T]here must be insufficient time to go through normal enforcement channels; . . . ." (C. A. at A35)

and

> "At the trial he [the Secretary on behalf of a complainant] must prove before a federal judge . . . 4) that the urgency of the situation provided 'insufficient time . . . to eliminate the danger by resort to regular statutory enforcement channels.'" (C. A. at A36.)

However, the Court made those observations in the context of a factual setting wherein:

> 1. Prior to July 10, 1974, no employee ever had refused to clear guard screen or to work on the screen for any other purpose (Tr. 28, 58-9, 78-80). The Complainants themselves had performed those tasks on a nightly basis for from eight months to several years (Tr. 8, 28, 42-3, 54-5; Jt. Ex. 1, pp. 227, 239).
>
> 2. Two other employees willingly accepted the work assignment which the complainants refused (Tr. 80).
>
> 3. Since July 10, 1974, no employee (including the Complainants) has refused a work assignment involving guard screen work (Tr. 56, 85).
>
> 4. Guard screen work by Maintenance Department employees extends to 30 man-hours per week and always has been at that level (Jt. Ex. 1, p. 458).

The facts clearly indicate that the condition in question was one that had existed for many years. It was not new or extraordinary. The Act had been in effect for several years prior to the work refusal; at any point during that period, the Complainants or their fellow guard screen employees could have resorted to the normal enforcement channels. None did.[21]

The Court does not reconcile its decision with those facts, even though its own analysis of the regulation would mandate dismissal of the case for want of urgency and/or inadequacy of the normal enforcement channels.

While the Court does cite the June 28 fatality as basis for the Complainants' purported apprehension (C. A. at A6)—possibly as indirect justification for setting up an urgent or no-recourse situation on July 10—it completely ignores other crucial, undisputed facts:

> 1. Following the accident which led to the fatality, and prior to July 10, 1974, Whirlpool made repairs and inspected the screen (Tr. 13).

21. Several months prior to July 10, 1974, OSHA inspectors had conducted a comprehensive inspection of the plant, in company with a maintenance employee who frequently works on the screen. No citation was issued relative to the guard screen as a result of that inspection (Jt. Ex. 1, pp. 354-6, 361-2).

2. Although interim procedures were implemented, temporarily mandating that no employee was to walk on the screen, the Complainants knew on or before July 7—at least three days prior to the disputed work refusal—that their work sooner or later would require that they walk on the screen system.[22]

3. In light of that awareness, the Complainants requested to meet with supervision and did meet with supervision on July 7; they then asked supervision to assign other employees to work on the screen (Jt. Ex. 1, pp. 466-68). Supervision, in turn, declined their request but directed that a further inspection be made of the screen they would have to clean (Tr. 15-16, 33, 60).

Thus, the record shows that the Complainants had at least three days' prior notice of the assignment which they ultimately refused, even apart from the fact that they had performed similar work for years.

The Court of Appeals did not even mention that fact or explain why three days' time was insufficient to invoke the special inspection provisions afforded under the Act.

Nor does the Court reconcile its decision with the fact that the Complainants *did* contact the senior OSHA official in the area about the matter more than one full day prior to receiving the assignment which was refused (Tr. 17-18, 38). Significantly, moreover, by the time that contact was made, OSHA *already* had made an inspection of the screen system, on July 1 and 5 (Jt. Ex. 1, pp. 19-29). This was not, therefore, a case where the urgency of the situation precluded resort to normal administrative remedies. There was ample time and, indeed, the remedies already had been initiated.

22. See testimony of Deemer at Tr. 4, whereat the Complainant testified on direct examination that he knew the interim procedure was inadequate to do the job (". . . that was my opinion. There was just too much stuff that had to be done and it couldn't be done that way") and at Tr. 22 (. . . "I knew we were going to have to walk it sooner or later").

The Court, therefore, created an urgent, no-recourse situation where none existed in fact.[23] It chose to rewrite and/or ignore facts bearing directly on the questions of immediacy and urgency in order to create an impression that the Complainants merely refused the job in order to gain time to invoke regular enforcement procedures. That it did so casts serious doubt upon the strength of the Court's confidence in the soundness of its analysis. In light of the facts which actually appear on the record, the Court properly should have dismissed the complaint for want of a showing that an urgent, no-recourse situation was presented (assuming, *arguendo,* the regulation be found valid despite the legislative history).[24]

23. The Court at footnote 6 of its opinion (C. A. at A6) refers to the fact that a drawn-out citation proceeding followed the accident. The Court apparently is suggesting that the enforcement procedures are too slow to provide effective recourse. That reference is not material, however, because it fails to explain why, if the danger was so immediate, OSHA at no time before or after the work refusal even sought judicial intervention pursuant to Section 13 of the Act.

24. Had the Court fairly acknowledged the facts but nevertheless sustained the Complainants, it clearly would have been invading both the legislative prerogatives of Congress and the regulatory powers of the Secretary as well. Clearly, there is nothing in the regulation itself which even remotely would suggest that a work refusal is protected if undertaken with sufficient time to invoke the statutory procedures, or, certainly where those procedures already have been invoked. Indeed, the regulation *affirmatively* recites:

> "(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards."

The Court's opinion not only is bottomed on patent misreadings of the facts regarding prior opportunities to utilize the regular enforcement procedures of the Act, it literally is replete with misstatements of fact touching other elements of the regulation as well.

Thus, key elements required to exist as a condition of the protection purportedly extended by the regulation are the certainty and immediacy of danger, and an employer's refusal to take corrective measures to attenuate the danger. The regulation on its face clearly holds that potential or possible hazards are not covered; it holds as well that where there is a dispute as to the existence of a hazard:

> "[A]n employer would not ordinarily[25] be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards."

Indeed, the Court admits that the regulation is directed at conditions which present so clear and obvious danger than an employee is—as the Court emotionally puts it—literally faced with an immediate "life or death" choice (C. A. at A5), and that the employer must be shown indifferent thereto.

In order to mold this case into such a posture, the Court stated:

> "The questionable safety of the 16-gauge screens is demonstrated by several incidents where workers fell partly through them and at least one incident where a worker fell to the plant floor below but survived. A number of maintenance employees reacted to these 'near misses' by frequently bringing the unsafe screen conditions to the attention of their foremen. Their complaints were to no avail, and on June 28, 1974, a maintenance employee fell to

25. The qualification "ordinarily" is not defined. An employer is denied due process when cited for violation of a standard not clearly delineated; to the extent the Secretary attempts to justify the regulation's application in this case by reference to the qualification, the regulation should be held unconstitutionally vague.

> his death through the guard screen in a section where stronger wire mesh had not yet been installed. Although Whirlpool did respond to the fatality by issuing a general order directing maintenance employees to clean guard screens without walking on them and to effectuate some repairs where the screens were weak, two employees who regularly worked on the screens pointed out that many hazardous areas remained. . . . [t]he company did not respond to their fears regarding these areas . . . " [Footnote omitted.] (C. A. at A6.)

Possibly, the Court was so concerned with upholding the regulation that it failed correctly to note the facts which are:

1. Only the two Complainants have ever refused to perform assigned duties on the screen.

2. The two Complainants refused to perform such duties on July 10, 1974 but not before and not since.

3. Their job on July 10 was performed by two other employees who did not protest.

4. There is no evidence that any employee other than the Complainants "complained" about the screen "to no avail." Certainly, there isn't even a bare shred of evidence connecting—as the Court purports to do—any prior complaint about the screen with the fatal accident! Knowledgeable witnesses who testified about the accident admitted that the accident was entirely unforeseeable (Jt. Ex. 1, pp. 212-13, 282). The OSHA inspector stated to Whirlpool management:

> "It was a tragic accident. I believe it resulted from a mechanical failure and I can't see what you could have done to prevent it." (Jt. Ex. 1, pp. 461-62, 535).

And the Review Commission ultimately concluded that there was no basis in the record to find that Whirlpool violated the Act in connection with the accident:

"Although this accident gave rise to the inspection, its occurrence is not reflected in the citation. As noted, the accident occurred as a result of the failure of two bolts. The citation, on the other hand, as indicated by the evidence and arguments of the Secretary, was concerned with the nature of the screen mesh. For example, the compliance officer testified that if all the screens had been comprised of the new heavy gauge mesh, no citation would have been issued. Therefore, whether this accident was the result of a recognized hazard is not before us, and respondent's argument that the accident was the result of an unforeseeable and unpreventable equipment failure is inapposite." *Secretary of Labor* v. *Whirlpool Corporation,* 5 OSHC 1173, 1174 at fn. 1 (BNA (1977).)

The record does show, on the other hand, that:

5. Skilled maintenance employees regularly inspected the screen for defects, defects were corrected as found, and Whirlpool systematically was replacing the screen (Jt. Ex 1, pp. 208-210, 223, 268-70, 459, 513).

6. All of the incidents referred to by the Court had occurred at times remote from the work refusal and on screen which had long since been replaced (Jt. Ex. 1, pp. 161-65, 175, 182, 231, 236-38).

7. Stress tests made by engineers showed that the lightest weight screen construction extant at the time of the events of this case withstood, without signs of failure, 600 pound weights applied to a foot-like area and 300 pounds applied to a single point (Jt. Ex. 1, pp. 514-19 and associated Exhibit R-11).

8. The Administrative Law Judge found that Whirlpool's guard screen was not per se in any way a hazard or known to be such in industry.[26]

26. Commenting on the Secretary's evidence given at the citation hearing, the Judge found:

"The compliance officer, admittedly not qualified as an expert, saw guard screens for the first time at respondent's plant on

(Footnote continued on next page.)

9. Whirlpool did not receive any criticism regarding its guard screen in February, 1974, when another OSHA inspection was conducted within its plant. The inspector was in close proximity to the screen at numerous times during his inspection and was directed in the inspection by a nonmanagement employee who frequently worked on the screen (Jt. Ex. 1, pp. 268-72, 354-59, 384-85, 394-401 and associated Exhibits introduced at the citation hearing as Resp. Exs. 2, 3A-B, 4A-F, 5A-F, 11).

In addition, and *after* the fatal accident but prior to the work refusal:

10. The Complainants and their supervisor toured the guard screen area to look for possible defects. Corrective action was initiated where defects were noted (Tr. 33, 54-5).

11. The supervisor physically tested the screen (by walking on it) before making the disputed work assignment (Tr. 30-1, 40, 48-9, 76-8).

12. The Complainants did not—as the Court states—cite the interim procedure in justification of their refusal.[27]

(Footnote continued from preceding page.)

July 1, 1974, and made no tensile tests of the types of screen involved at any time. He felt that the newer type screen which was in the process of installation by the respondent would comply with the Act but was not sure of the proper method of abatement and intended to leave the choice of a method of abating the hazard to Whirlpool.

"The expert called by the complainant, who had no experience with suspended screen guard systems, while he felt that the screens were not adequate to sustain the weight of a walking man, he made no stress tests of the screen and did not suggest a method of abating the hazard." *Secretary of Labor* v. *Whirlpool Corporation,* 1977-78 OSHD ¶ 22,073 (CCH, 1977).

27. Testimony of the Complainants will be searched in vain for any such statement. The Court's statement is inconsistent with the following direct testimony of Complainant Deemer:

Q. "Did you ask Mr. Price why you couldn't clean it from the Verta-Lift as you had been doing?

A. "Not really, because I knew we were going to have to walk on it sooner or later." (Tr. 22)

> They refused without any explanation other than the general safety of the screen.

There is no dispute about any of the foregoing facts. There should be no dispute that the foregoing facts take this case far outside the ambit of the regulation. The facts show that the Complainants but no one else believed that their assignment on July 10, 1974 presented a clear and immediate danger, that Whirlpool had taken considerable care to identify and correct hazardous conditions both before and after the fatal accident,[28] and that there was at best a difference of opinion on July 10, 1974 over the general safety of the screen system rather than some clearly dangerous condition which presented a "life or death" choice.

Regardless whether this Court determines that the regulation properly or improperly extends the protections of the Act to certain work refusals, it should be clear that *this* work refusal was not protected. Moreover, that the Court of Appeals felt compelled to exaggerate and misstate the facts in order to create a setting in which to sustain the regulation, should demonstrate again the need for judicial deference to Congress' policy-making prerogatives regarding the need for work refusal protection.

Presented here was a dispute between two employees and their immediate supervisors regarding the question whether a normal work assignment was potentially a hazard. The matter had been discussed well before the work refusal occurred. Supervision had acted previously to correct what hazards may have existed and had physically tested the condition. OSHA

28. Although OSHA did issue to Whirlpool a citation, which the Review Commission recently affirmed, OSHA gave Whirlpool maximum credit for good faith relative to the guard screen (Jt. Ex. 1, pp. 62-63). The Commission affirmed that position, noting:

> "Whirlpool's good faith towards compliance with safety requirements is evidenced by its program to improve the safety of the guard screen system. . . ." *Secretary of Labor* v. *Whirlpool Corporation,* 7 OSHC 1356 at 1361 (BNA, 1979).

had been contacted and had investigated but declined to take action to have the condition shut down. The conditions were not viewed as abnormally dangerous by other employees or, indeed, by the Complainants in the course of numerous hours of work thereon prior to July 10, 1974, or after that date.

This is precisely the kind of situation Congress elected not to regulate under OSHA; the Secretary's regulation so holds; and the complaint, accordingly, should be dismissed.

CONCLUSION.

For the foregoing reasons, Whirlpool respectfully requests this Court to enter an Order reversing the decision of the Court of Appeals and affirming the decision of the District Court with respect to the issue as to the validity of the Secretary's regulation. Whirlpool further requests this Court to enter an Order reversing the decisions of the Court of Appeals and District Court with respect to the issue as to whether Whirlpool unlawfully disciplined the Complainants for refusing to perform their work assignments on July 10, 1974.

Respectfully submitted,

ROBERT E. MANN,
RONALD J. HEIN, JR.,
MARK A. LIES, II,
Attorneys for Petitioner, Whirlpool Corporation.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON,
55 East Monroe Street, Suite 4200,
Chicago, Illinois 60603,
(312) 346-8000,
Of Counsel.

FOR ARGUMENT

No. 78-1870

In the Supreme Court of the United States

OCTOBER TERM, 1979

WHIRLPOOL CORPORATION, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

WADE H. McCREE, JR.
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN A. CLAUSS
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for
Occupational Safety and Health

LOIS G. WILLIAMS
Deputy Associate Solicitor for
Special Litigation

DENNIS K. KADE
Assistant Counsel for
Appellate Litigation

THOMAS L. HOLZMAN
JOSEPH M. WOODWARD
Attorneys
Department of Labor
Washington, D.C. 20210

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 593 F.2d 715. The opinion of the district court is reported at 416 F. Supp. 30 (Pet. App. A43-A49).

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1979, and a petition for rehearing was denied on April 4, 1979 (Pet. App. A40-A42). The petition for a writ of certiorari was filed on June 18, 1979, and was granted on October 1, 1979 (A. 12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1), as interpreted by the Secretary of Labor in 29 C.F.R. 1977.12(b)(2), prohibits an employer from retaliating against an employee who refuses to perform particular assigned tasks that the employee reasonably believes present an immediate danger of death or serious bodily injury under circumstances that do not provide sufficient time to resort to the regular enforcement procedures under the Act.

STATUTE AND REGULATION INVOLVED

1. Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1), provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

2. 29 C.F.R. 1977.12, 38 Fed. Reg. 2681, 2683, as corrected 38 Fed. Reg. 4577 (1973), provides:

> *Exercise of any right afforded by the Act.*
>
> (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any

right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

STATEMENT

1. Petitioner Whirlpool Corporation maintains a manufacturing plant in Marion, Ohio, for the production of household appliances (Pet. App. A5). Overhead conveyors transport appliance components throughout the plant. To protect employees from parts that occasionally fall from the conveyors, petitioner has installed a wire mesh "floor" approximately 20 feet above the plant floor (Pet. App. A5;

Jt. Ex. 485, 496; Tr. 9).[1] The wire mesh is welded to angle iron frames, which are supported by angle iron hangers suspended from the building's structural steel skeleton (Jt. Ex. 488-494).

Maintenance employees in the plant spend an average of 15-30 hours weekly per employee removing fallen parts from the screen, replacing paper spread on the screen to catch grease drippings from the parts on the conveyor, and performing occasional maintenance on the conveyors themselves (Pet. App. A5; Jt. Ex. 135, 156, 176-177, 458; Tr. 10). To do so, employees customarily walked on the guard screen "floor" (Pet. App. A5; Jt. Ex. 156; Tr. 10). Prior to the time of the events in this case, the company's safety instructions admonished workers to step carefully and only on the angle iron frames (Jt. Ex. 250-251, 281; Tr. 10). Although employees usually were able to perform their tasks while standing on the frames, they had to step onto the wire mesh itself from time to time. In addition, workers sometimes inadvertently fell onto the screen panels (Jt. Ex. 176-177, 231).

In 1973 the company began to install heavier wire mesh in the screens because the safety of the original panels was "questionable" (Pet. App. A5-A6; Jt. Ex. 54, 459, 500-501, 513). Several maintenance men

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[1] "Jt. Ex." refers to the transcript of a hearing before an Administrative Law Judge of the Occupational Safety and Health Review Commission (see note 3, *infra*), which was admitted into evidence at trial. "Tr." refers to the trial transcript.

had fallen partly through the lighter mesh and one had fallen to the floor below (Pet. App. A6; Jt. Ex. 162-164, 175, 176, 230-232; Tr. 11).

Petitioner received a number of complaints about the unsafe nature of the older screens from two maintenance employees, Virgil Deemer and Thomas Cornwell.[2] In mid-June 1974, the company safety director dismissed one such complaint with the comment that "the guard screen was not made to walk on" (Tr. 12). A few weeks later, on June 28, 1974, a maintenance employee fell to his death through the guard screen in an area where the newer, stronger mesh had not yet been installed (Pet. App. A6; Jt. Ex. 135, 223, 448; Tr. 12).[3]

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[2] In fact, less than one year before the events at issue in this case, Cornwell slipped from the angle iron and broke a bone in his wrist trying to stop his fall when his foot plunged through the screen (Jt. Ex. 231-232; Tr. 43-44).

[3] As a result of this fatality, the Secretary conducted an investigation that resulted in the issuance of a citation charging the company with maintaining an unsafe walking and working surface, in violation of the Act's general duty clause, 29 U.S.C. 654(a)(1). The general duty clause provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." After extensive administrative proceedings, the Occupational Safety and Health Review Commission affirmed the citation, finding that petitioner's recognition of the hazard was demonstrated by its instructions to employees to walk on the angle irons, not the screens, and by the series of accidents on the screens. *Whirlpool Corp.*, 3 Empl. Safety & Health Guide (ESHG) (CCH) ¶ 23,552 (May 11, 1979). The company has petitioned for review of that decision in the United States Court of

After the fatal accident, petitioner issued a general order strictly forbidding maintenance employees from stepping on the screens or the supporting structure (Pet. App. A6; Tr. 13, 45, 97). An alternative method of cleaning the screens was developed, whereby employees stood on power-raised mobile platforms (Verta-Lifts) and used hooks to recover fallen parts (Pet. App. A45; Tr. 13). Although maintenance employees could complete most of their duties in this fashion, the Verta-Lift procedure took longer, and there was some question whether the lifts could be raised sufficiently high to permit maintenance of all the screens (Pet. App. A6; Tr. 13-15, 88). Deemer and Cornwell therefore believed that they might have to resume walking on the guard screens, and, as a result, they continued to be concerned about the safety of the screens (Pet. App. A6; Tr. 13-15).

Deemer and Cornwell met with the company's maintenance supervisor on July 7, 1974, to discuss their concern. The maintenance supervisor disagreed with their view that the screens were unsafe, but he agreed that the two men could inspect the screens with their foreman on their next shift and point out dangerous areas needing repair (Pet. App. A6; Tr. 14-15, 81-82). The inspection took place that night, and Deemer and Cornwell identified places in the guard screens that "were in bad need of repair" (Tr. 34) because of holes in the screens or loose or missing

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frame bolts (Tr. 15-16, 33-34, 59-60, 83).[4] Some repairs were made, but these efforts were terminated before all the areas identified as hazardous were repaired (Pet. App. A6; Tr. 16, 34-35). Beyond these visible defects, there was evidence that the old style mesh was generally unsafe because it would not adequately support the weight of a person standing on it (Pet. App. A5-A6; Tr. 21, 34, 46, 49; see also *Whirlpool Corp.*, 3 Empl. Safety & Health Guide (ESHG) (CCH) ¶ 23,552, at 28,534 n.6) (OSHRC May 11, 1979).

Concerned that petitioner did not take their fears about the screens seriously, Deemer and Cornwell had a meeting on July 9 with the plant safety director, at which they requested the name, telephone number, and address of a representative of the local office of the Occupational Safety and Health Administration (Pet. App. A6; Tr. 16-17). The safety director appeared reluctant to furnish the information and told the men that they "had better stop and think about what [they] were doing" (Pet. A6; Tr. 17). These actions, characterized by the court of appeals as "veiled threats" (Pet. App. A6), led Deemer to believe that the safety director was attempting to discourage them from using the safety procedures of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (Tr. 37). After furnishing the information about OSHA, the safety director also asked

[4] The fatal accident on June 28, 1974, apparently was the result of unfastened or missing bolts in a screen frame (Jt. Ex. 75, 212). See also *Whirlpool Corp., supra,* 3 ESHG (CCH) ¶ 23,552, at 28,532.

Deemer and Cornwell to write down their names, clock numbers, and department number (Pet. App. A6; Tr. 17). Later the same day, Deemer contacted an official of the regional OSHA office and discussed the guard screens (Tr. 17-18).

On the following day, July 10, 1974, Deemer and Cornwell reported for the night shift at 10:45 p.m. and awaited assignment (Pet. App. A6; Tr. 19, 48). In a departure from his normal practice, the foreman first assigned tasks to all of the other maintenance employees. He then directed Deemer and Cornwell to meet him with the Verta-Lift at the bulkhead service line. The guard screen in this area was one on which the old mesh had not been replaced or fully repaired, despite the fact that the two men had identified specific instances of hazardous disrepair during their inspection tour with the foreman three days earlier (Tr. 19-20, 33-35, 47-48, 82-83).

All three men ascended to the screen, but Deemer and Cornwell remained on the Verta-Lift while the foreman walked along the angle iron frame supporting the screen (Tr. 20-21, 89).[5] The foreman returned to the Verta-Lift and told the two men that he believed the screen was safe so long as they used "extreme caution" (Tr. 21-22, 48, 102). Then, in violation of the outstanding company directive that

[5] The foreman's tour of the guard screens did not expose him to the hazards facing workers who must police the screens. It is comparatively easy to step only on the angle iron frames and use handholds if an individual's hands are empty and there is no need to reach components resting on the wire mesh (Jt. Ex. 176-177, 231; Tr. 89).

maintenance work should be accomplished without stepping on the screen apparatus, the foreman ordered Deemer and Cornwell onto the apparatus to clean the screen. The foreman, however, pointed out several areas that he did not want the men to walk on because he did not believe the areas were adequately supported (Pet. App. A6, A44-A45; Tr. 21-22, 48, 89, 102). When Deemer and Cornwell refused to carry out the order, claiming that the screens were unsafe, the foreman immediately sent them to the personnel office. The men were ordered to punch out without working the remaining six hours' shift time, and they subsequently suffered a loss in pay and received written reprimands (Pet. App. A6; Tr. 21-23, 31, 36, 49, 78-79).

2. On August 24, 1974, the Secretary of Labor filed suit in the United States District Court for the Northern District of Ohio, alleging that petitioner's disciplinary action constituted unlawful retaliation against Deemer and Cornwell in violation of Section 11(c)(1) of the Act, 29 U.S.C. 660(c)(1). After a bench trial, the district court agreed that petitioner had violated 29 C.F.R. 1977.12(b)(2), the regulation interpreting Section 11(c)(1), which provides that an employer may not retaliate or discriminate against an employee who refuses to perform a task that he reasonably believes presents a real danger of death or serious injury, under circumstances allowing insufficient time to resort to the regular statutory enforcement channels to eliminate the danger.

The district court found that Deemer and Cornwell "refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm" (Pet. App. A45). The court observed that the two men were denied the opportunity to use the Verta-Lifts, the alternative procedure the company had developed for cleaning the screens after the fatal accident. Moreover, in the court's view (*ibid.*), "the fact that a man had fallen through the screen and been killed is the strongest possible evidence that it was unsafe and dangerous." Thus, the court concluded that the danger presented was "real and not something which existed only in the minds of the employees" and that the employees acted in good faith and had no reasonable alternative to refusing to work (*id.* at A45-A46).

The district court nevertheless denied relief, because it concluded that the regulation exceeded the Secretary's authority under the Act (Pet. App. A47-A49). The court did not hold that the regulation conflicts with any provision of the Act or with the underlying statutory purpose to prevent occupational injuries. Rather, the court relied solely on two aspects of the legislative history of the Act that it believed were indicative of a congressional intent inconsistent with the terms of the regulation. Specifically, the court found it significant that Congress had rejected a provision that would have allowed employees to absent themselves from work in certain situations without loss of pay and had refused to adopt another provision that would have permitted a Department

of Labor inspector, without resort to judicial process, to close down a workplace presenting an imminent danger to the health or safety of employees. Hence, according to the district court, "Congress squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not" (Pet. App. A47).

3. The court of appeals reversed. The court agreed with the district court's factual determination that petitioner had violated the Act (as interpreted by the regulation) finding in the record "ample support for [the] conclusion that the employees declined to do their work because they reasonably feared for their lives" (Pet. App. A5 n.5). But the court of appeals disagreed with the district court's holding that the regulation is invalid.

The court of appeals pointed to the liberal construction given antidiscrimination provisions in other remedial statutes, notably the National Labor Relations Act (see *NLRB* v. *Scrivener*, 405 U.S. 117 (1972)), and suggested that it would have found the complainants in this case protected against management retaliation for their refusal to mount the guard screens even in the absence of the Secretary's regulation affording that protection (Pet. App. A15-A18). In any event, the court of appeals concluded that the regulation, to which it owed the "traditional deference" paid to an administrative interpretation of an Act of Congress, is consistent with the Act's remedial purpose to reduce danger in the workplace and with

Congress' conclusion that employee participation is crucial to effective enforcement of the Act (*id.* at A10-A12). Finding the "right to a hazard-free work place * * * implicit throughout the Act" and "specifically contained in the Act's statement of purpose" (*id* at A17), the court reasoned that Section 11(c)(1) must protect the correlative right to refuse work "in the face of deadly peril" and (*id.* at A12) that the section should be so interpreted to avoid having the statutory protections "gutted by employer intimidation."

The court of appeals then rejected the argument, on which the district court had placed its exclusive reliance, that the legislative history revealed an intent to deny employees the protection afforded by the regulation (Pet. App. A20-A36). The court observed that the provision permitting employees to receive pay when they refused to work in certain situations was quite different from the regulation at issue in this case because it did not deal with threats of imminent death or serious injury (*id.* at A27). Moreover, the court found that, particularly because the rejected provision was repeatedly branded as a right to "strike with pay" (*id.* at A27-A28 & n.35), congressional resistance stemmed solely from "the added incentive" afforded to employees who would receive their regular compensation when they did not perform work (*id.* at A29-A30). This piece of legislative history therefore did not, in the court's view, undercut the validity of 29 C.F.R. 1977.12(b)(2), which confers no right to receive pay for services not performed.

The court of appeals was also not persuaded that Congress' refusal to grant the Secretary of Labor administrative authority to halt operations presenting imminent dangers without seeking a prior judicial order had any bearing on the validity of the regulation, which merely protects individual employees from employer retaliation in certain narrowly defined circumstances. In the court's view, the provision for administrative closings was rejected by Congress because of fears of its potential for misuse, perhaps as an aid to striking workers, and because of doubts about its fairness or constitutionality (Pet. App. A34-A35 & nn.46-47).

SUMMARY OF ARGUMENT

Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1), provides that an employer may not discharge or otherwise discriminate against an employee for exercising "any right afforded by this Act." Soon after the Act was passed, the Secretary of Labor promulgated a regulation interpreting the Act to afford an employee a right, under narrowly limited circumstances, to refuse to perform a task that the employee reasonably and in good faith believes would expose him to a "real danger of death or serious injury." 29 C.F.R. 1977.12(b)(2). The regulation further provides that the employer is prohibited by Section 11(c)(1) of the Act from discriminating or retaliating against the employee for his exercise of this limited right to refuse imminently hazardous work.

Petitioner challenges the interpretation of the Act contained in the regulation, arguing that the Act provides no protection from employer retaliation no matter how grave and immediate the danger confronting the employee when he refused to work. We submit that the regulation correctly construes the Act, because Congress could not have expected an employee to remain at his post under perilous circumstances on pain of being disciplined or fired by his employer. An examination of the structure and purposes of the Act confirms this conclusion.

I

The regulation, promulgated pursuant to the Secretary's "broad authority" under 29 U.S.C. 657(g)(2) (see *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 317 n.12 (1978)) to issue rules and regulations to carry out his responsibilities, reflects a reasonable and contemporaneous interpretation of the Act.

A. The purposes of the Occupational Safety and Health Act are to assure "so far as possible" that every working man and woman will have "safe and healthful working conditions" and "to preserve our human resources." 29 U.S.C. 651. These purposes are implemented through specific health and safety standards promulgated by the Secretary and by a general statutory requirement that an employer furnish his employees with a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654.

The Act also provides a procedure to counteract imminent dangers of death or serious injury. An employee may request an inspection of the workplace, which is to be conducted with dispatch. 29 U.S.C. 657(f)(1). The Secretary is then authorized to seek injunctive relief if the inspection confirms the existence of an imminently dangerous condition of employment. 29 U.S.C. 662. An employee may properly be expected to follow these statutory procedures to eliminate the danger, rather than merely refusing to work, when he has a reasonable opportunity to do so. For this reason, the Secretary has not interpreted Section 11(c)(1) of the Act to protect an employee from employer retaliation if he simply refuses to perform dangerous work indefinitely or in lieu of contacting an OSHA representative. See 29 C.F.R. 1977.12(b)(1).

The Act does not expressly provide, however, what an employee should be expected to do when he is ordered to perform a dangerous task at a time when he does not have a reasonable opportunity to contact an OSHA representative or, after he contacts the representative, while waiting for the statutory imminent danger procedures to run their course. The limited right to refuse work recognized in 29 C.F.R. 1977.12(b)(2) applies only in these narrow circumstances, when the statutory procedures are unavailable. To insist that the employee must continue to work in the face of imminent danger would be to create the unwarranted risk of death or serious injury that Congress specifically sought to avoid. 29 U.S.C. 654(a)(1). Such a construction would be

wholly inconsistent with the clear design of the Act to prevent the first accident and to involve employees at all phases of its implementation, including in imminent danger situations.

Finally, if an employee has a good faith and reasonable fear of death or serious injury, it would be manifestly unfair to insist that he nevertheless continue to work on pain of employer sanctions. An employee's refusal to work under such circumstances is "unquestionably activit[y] to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours." *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

B. In addition to recognizing a personal right under the Act to refuse to work, the regulation is also an appropriate measure in aid of the Secretary's investigative and enforcement responsibilities and in implementation of the antidiscrimination prohibition in Section 11(c)(1) of the Act. Because of the shortage of investigators and the unpredictability of the occurrence of imminent dangers, the Secretary must rely on information provided by employees. A refusal to work in the face of an imminent danger will generally be intimately bound up with the process of contacting the Secretary for assistance. Hence, the antidiscrimination provision in Section 11(c)(1) must be given a liberal construction protecting this refusal to work in order to further that section's purpose of preventing these channels of communication from being closed through employer in-

timidation. *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972). Similarly, recognition of a right to refuse to work when the employee is unable to initiate contact with an OSHA representative preserves the status quo in the manner least likely to result in a serious accident, thereby enabling the Secretary to perform his statutory duties under the imminent danger provisions in a meaningful manner.

C. The Act's recognition of a limited right to avoid hazardous work is consistent with the pattern of existing labor legislation. Indeed, it is narrower in important respects than rights long protected under Section 7 of the National Labor Relations Act, 29 U.S.C. 157, which protects concerted activity pertaining to safety matters irrespective of any objective assessment of the seriousness of the hazard or the absence of any attempt by the employees to have the condition corrected by other means. Moreover, Section 502 of the Labor-Management Relations Act, 29 U.S.C. 143, creates an exception to an express or implied no-strike obligation in a collective bargaining agreement for a refusal to work under "abnormally dangerous" circumstances. *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 385-387 (1974). Finally, the comparable antidiscrimination clause of the Federal Coal Mine Health and Safety Act, 30 U.S.C. (Supp. I) 815(c)(1), has been interpreted by the courts and Congress to embody a right to refuse to work in dangerous situations.

II

In attacking the validity of 29 C.F.R. 1977.12 (b)(2), petitioner places principal reliance on two portions of the legislative history of the Act. Neither supports petitioner's position.

A. During the legislative debates prior to the passage of the Act, Congress failed to adopt a provision that would have required employees to be paid their regular wages if they absented themselves from work to avoid exposure to certain toxic or harmful substances. However, this right would not have arisen until 60 days after the government had determined that the substance was harmful or toxic. Given this 60-day waiting period, the rejected provision did not address the *imminent* dangers covered by the regulation. In addition, opposition to this provision, which was repeatedly referred to as a right to "strike with pay," was premised solely on the fact that employees would be paid while not working—a novel proposition in federal labor legislation. The regulation involved here does not require an employer to pay an employee who does not work.

B. Congress also failed to adopt a provision giving an OSHA inspector the authority, without resort to the judicial process, to close down an operation or plant in the face of an imminent danger to employee health or safety. Petitioner infers that this demonstrates the congressional intent that a cessation of employer operations should never occur unless the Secretary first obtains a court order and that an employee is therefore not protected by the Act if, on

his own initiative, he refuses to work rather than risk life or limb.

However, opposition to the administrative shutdown provision stemmed from a fear of arbitrary action *by the government*, acting through a single inspector who might be inexperienced or susceptible to pressure from labor or management in the midst of a labor dispute. Opponents of the provision also questioned its fairness and constitutionality, arguing that the drastic consequence of a government-ordered plant closing should not occur without the procedural protections offered by judicial proceedings.

The Secretary's regulation, in contrast, does not authorize the government to shut down a plant without a court order. Rather than intruding the government into labor disputes, it merely protects an individual employee's personal decision to refuse work rather than risk death or serious injury. Moreover, the employee who refuses work in reliance on the regulation runs the risk that the Secretary or the courts will subsequently find that his refusal to work was unreasonable under the circumstances. This furnishes a significant check on the exercise of the self-help right.

ARGUMENT

I

THE REGULATION PROHIBITING EMPLOYER RETALIATION AGAINST EMPLOYEES WHO REFUSE TO WORK UNDER HAZARDOUS CONDITIONS IS CONSISTENT WITH THE OCCUPATIONAL SAFETY AND HEALTH ACT

Petitioner argues that the Secretary of Labor has no authority under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, an Act of Congress whose overriding purpose is to prevent occupational illness or injury, to ensure that an employer does not take retaliatory action against an employee who refuses in good faith to perform a specific assigned task that the employee reasonably believes would expose him to a real danger of death or serious bodily injury. Petitioner contends that the Secretary lacks this authority even where the employee first sought to have his employer correct the dangerous condition and where the employee had insufficient time, due to the urgency of the situation, to eliminate the danger by resorting to the statutory enforcement procedures otherwise provided in the Act.

Like the court of appeals (Pet. App. A39), however, we submit that "the same Congress which wanted employees to work in safe and healthful surroundings could not have meant for them to die at their posts." The regulation petitioner attacks, 29 C.F.R. 1977.12(b)(2), is consistent with this inescapable conclusion. Indeed, as one commentator

has observed, "the credibility of the entire Act would be questionable if workers could be forced to risk death or serious physical harm to prevent being permanently discharged." M. Rothstein, *Occupational Safety and Health Laws* § 186, at 199 (1978).[6]

A. The Regulation Represents a Reasonable and Contemporaneous Construction of the Act as Embodying a Right of Employees to Refuse to Work Under Conditions That Create a Reasonable Fear of Death or Serious Injury When There is no Alternative Available

The regulation at issue in this case, 29 C.F.R. 1977.12(b)(2), provides that an employee may not be subjected to employer discrimination or retaliation for refusing to work under certain limited circumstances. The employee must be confronted with a situation in which "a reasonable person * * * would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." The regulation further provides that, where possible, the employee "must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."[7] What is more,

[6] The complainants in the present case were disciplined, not discharged. Nonetheless, petitioner's argument would extend as well to situations in which an employer fired an employee for refusing to work under hazardous conditions.

[7] In addition to arguing that the regulation is invalid, petitioner contends (Pet. Br. 36-45) that the regulation was not violated in this case. However, the sole question presented

the Secretary has taken the position in enforcing the regulation that the employee is not entitled under the regulation to refuse an alternative assignment to a

in the petition for a writ of certiorari (Pet. 2) is whether the Secretary exceeded his authority in promulgating the regulation, and it was that question alone on which the Secretary acquiesced in review and that the Court agreed to decide. The question whether the regulation was violated in the particular circumstances of this case is therefore not before the Court. Sup. Ct. R. 23(c); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-178 (1938).

In any event, as the court of appeals observed, there is in the record "ample support for [the district court's] conclusion that the employees declined to do their work because they reasonably feared for their lives" (Pet. App. A5 n.5). A maintenance employee fell through a guard screen to his death, and, in response, petitioner instituted a policy forbidding employees to walk on the guard screen apparatus. Complainants were justified in viewing the company's policy as a confirmation that the screens were, in fact, unsafe.

Moreover, there was substantial evidence that the complainants acted in good faith. Deemer testified, for example, that when he was taken by his foreman to the personnel office following his refusal to walk on the screens, he acknowledged that cleaning the screens was part of his duties but stated that "since a man was killed there should be some changes made" (Tr. 23; see also Tr. 31). Cornwell, who had previously cracked a bone in his wrist in an accident on the old-type screen (Tr. 43-44), testified that "it personally puts a scare in an individual when he has been in an area when somebody does lose their life. I know it scared me" (Tr. 45).

Petitioner suggests (Pet. Br. 38) that the complainants were not entitled to the protection afforded by the regulation because they "had notice" some three days before the work refusal that they would have to return to the guard screens and therefore should have resorted to other measures to eliminate the danger rather than refusing to work. However, the "notice" to which petitioner refers was nothing more than Deemer's own prediction that "sooner or later" the main-

safe task or reassignment to the same task if the hazard abates, if the employer corrects it, or if a safe method of performing it is proffered. Finally, the

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tenance personnel would have to go back on the screens because some of the work could not be done from the Verta-Lifts (Pet. Br. 38 n.22; see Tr. 14-22). This prediction on the employee's part is a far cry from being confronted with a specific order by his employer to perform a dangerous task. But it was because of this prediction that Deemer and Cornwell approached the plant safety director three days before they refused to go onto the screens. Thus, both when they approached the safety director and on the night of July 10, the complainants satisfied the requirement of the regulation that they seek to have the employer correct the situation before refusing work.

Petitioner also argues (Pet. Br. 38) that the protection of the regulation was unavailable because complainants had contacted an OSHA representative "one full day" prior to the work refusal and because an OSHA inspector had already made visits to the plant on July 1 and 5 in response to the fatal accident. This was therefore not a case, petitioner argues, "where the urgency of the situation precluded resort to normal administrative remedies." Petitioner overlooks the fact that at the time the screens were inspected and Deemer contacted the OSHA representative, maintenance personnel had not been ordered to return to the screens; indeed, there was an outstanding company policy forbidding them from doing so. In an abundance of caution, Deemer contacted the OSHA representative because he feared that this policy would change and that he would be confronted with the urgency of a specific order to go on the screens. When Deemer and Cornwell were specifically ordered onto the screens at 11 o'clock in the evening, they could reasonably conclude that there was no reasonable opportunity for the Secretary to intercede.

Petitioner also mentions the fact that other employees cleaned the screens after the complainants declined to do so (Pet. Br. 37; see Tr. 80). But contrary to petitioner's apparent assertion, this does not necessarily imply that those

Secretary has not interpreted the regulation to require payment of the employee for any period when no work is performed.[8]

Petitioner does not, and could not, argue that this carefully circumscribed regulation is barred by any specific provision of the Act or that it is inconsistent with the Act's fundamental purpose to prevent occupational injuries. Nor does petitioner suggest what other action an employee may fairly and reasonably be expected to take, instead of refusing to work, when he is confronted with a genuine and immediate threat of death or serious injury.

It should be emphasized, moreover, that this is hardly a question solely of academic interest. The

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employees believed that the screens were safe. Given the fact that Deemer and Cornwell were sent home for refusing to work on the screens, other employees could reasonably conclude that they would meet the same fate, or worse, if they too refused. It was precisely this type of coercion that the regulation was designed to prevent.

In sum, both lower courts correctly determined that petitioner's disciplinary actions against Deemer and Cornwell violated the regulation. Even assuming that this factual question is properly presented, it does not warrant further review. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967).

[8] Where there has been discrimination, the regulation does, of course, provide a right to be made whole. The Secretary has sought recovery in this action of approximately $50 wages lost by the employees because petitioner placed them on disciplinary suspension, rather than assigning them alternative tasks that it has not disputed were available. In general, the Secretary's regulation requires an employee who invokes it to perform safe, alternative tasks if they are available, and to forgo pay if they are not. Under the regulation, an employer will never have to pay wages without receiving (or forgoing the opportunity to receive) work.

reported decisions graphically illustrate the dilemma often faced by workers confronted with a specific and unanticipated order to perform a hazardous task. In *Marshall* v. *Daniel Construction Co.*, 563 F.2d 707 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978), for example, an employee was ordered by his foreman to mount a 150-foot-high steel skeleton on a windy day. And in *Marshall* v. *Seaward Constr. Co.*, 3 Empl. Safety & Health Guide (ESHG) (CCH) ¶ 23,433 (D.N.H. March 28, 1979), the employees were ordered to burn off rivets at the edge of a bridge under "extremely windy" conditions that the project engineer agreed presented a significant danger. The employees in both cases refused to perform the work because of genuine concerns for their safety, and they paid for their refusals with their jobs. As we demonstrate below, the Secretary's regulation affords employees such as these a realistic way to cope with their dilemma and thereby embodies a reasonable interpretation of the Act.

The Secretary of Labor is empowered by Section 8(g)(2) of the Act, 29 U.S.C. 657(g)(2), to "prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under the Act." The Court has described this section as a grant of "broad authority" to the Secretary. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 317 n.12 (1978). This authority unquestionably includes the power to "adopt regulations to carry into effect the will of Congress as expressed by the statute." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214 (1976),

quoting *Dixon* v. *United States*, 381 U.S. 68, 74 (1965), and *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936). See also *United States* v. *Larionoff*, 431 U.S. 864, 873 (1977).

A regulation promulgated pursuant to such authority "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), quoting *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969). See also *American Trucking Assns.* v. *United States*, 344 U.S. 298 (1953). Moreover, particular deference is due regulations that are based on a consistent and contemporaneous administrative interpretation of the statute concerned. In such circumstances, "[a] reviewing court is * * * to be guided by the 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. * * *'" *E. I. duPont deNemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8-9. Here, the regulation at issue was promulgated by the Secretary soon after passage of the Act (see 38 Fed. Reg. 2681 (Jan. 29, 1973), as corrected, 38 Fed. Reg. 4577 (Feb. 16, 1973)), clearly "carr[ies] into effect the will of Congress," and is reasonably related to the purposes of the statute.

The Act was passed in order to remedy the " 'drastic' national problem" of occupational death and injury. *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 444 (1977). The Act's stated purpose is

> to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions and *to preserve our human resources* * * *.

29 U.S.C. 651(b) (emphasis added). Remedial legislation such as this is to be liberally construed to effectuate the congressional goal. *United States* v. *An Article of Drug* * * * *Bacto-Unidisk*, 394 U.S. 784, 798 (1969); *Lilly* v. *Grand Trunk R.R.*, 317 U.S. 481, 486 (1943).

This general purpose was to be implemented in large part by authorizing the Secretary of Labor to promulgate safety and health standards, 29 U.S.C. 655, and by requiring that employers and employees abide by those standards, 29 U.S.C. 654(a)(2) and (b). But even in the absence of a specific safety standard governing a particular hazard, the employer has an overriding obligation under the Act's general duty clause to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1).[9] Thus, the

[9] This provision has been construed to require an employer to take every available feasible measure to discover and exclude from his workplace all conditions recognized as hazardous by the employer or by the industry of which it is a part. See, *e.g.*, *General Dynamics Corp.* v. *OSHRC*, 599 F.2d 453, 464 (1st Cir. 1979); *Titanium Metals Corp. of America* v. *Usery*, 579 F.2d 536, 543-544 (9th Cir. 1978); *Empire-Detroit Steel Div.* v. *OSHRC*, 579 F.2d 378, 384 (6th Cir. 1978); *National Realty and Constr. Co.* v. *OSHRC*, 489 F.2d 1257, 1265-1267 & nn. 35, 36, 37 (D.C. Cir. 1973).

Act on its face provides employees with a right to be free of hazards that are causing or are likely to cause death or serious bodily injury. The regulation at issue in this case is addressed to hazards of the same magnitude—ones that would subject an employee to a "real danger of death or serious injury." 29 C.F.R. 1977.12(b)(2).

Because the regulation is therefore based on a right that is expressed in the Act itself, the remaining question is whether the Act may reasonably be interpreted to recognize a companion right of an employee to refuse to work under hazardous conditions if they present an *imminent* danger of life and limb and if he has no reasonable opportunity to resort to the

The Occupational Safety and Health Review Commission found with respect to the guard screens involved in this case that petitioner had violated its obligation under 29 U.S.C. 654(a)(1) to furnish employment free of recognized hazards causing or likely to cause death or serious physical harm to its employees. The Commission concluded that petitioner's own recognition of the hazard was confirmed by its general instructions to employees to walk on the supporting angle irons, not the screens themselves, and by the series of accidents on the screens. *Whirlpool Corp.*, *supra*, 3 ESHG (CCH) ¶ 23,552, at 28,534 n.6. See note 3, *supra*. Of course, after the fatal accident, and before the complainants' refusal to work in this case, petitioner instructed its maintenance employees to stay off the screen structure altogether and to clean the screens from the Verta-Lifts. See pages 7, *supra*.

specific enforcement procedures set forth in the statute. If so, the employee must be free of employer retaliation when he does so, because Section 11(c)(1) prohibits retaliation in response to the exercise of "any right afforded by this Act." Again, guidance may be drawn from the very terms of the Act.

The Act makes clear that employees are to be integrally involved in its enforcement. Section 2 of the Act, 29 U.S.C. 651, provides that the purposes of the Act—to ensure "safe and healthful working conditions" and to "preserve our human resources"—are to be accomplished, *inter alia*, by encouraging both "employers and employees * * * to reduce * * * occupational safety and health hazards" at the workplace and stimulating them to institute and improve programs toward this end; by providing that employers and employees "have separate but dependent responsibilities and rights" with respect to the achievement of safe and healthful working conditions; by "building upon advances already made through employer and employee initiative"; and by "encouraging joint labor-management efforts" to reduce job related injury and disease. 29 U.S.C. 651(b)(1), (2), (4) and (13).[10]

[10] The Act reaches nearly five million workplaces, where more than 64 million individuals are employed. See *The President's Report [To Congress] On Occupational Safety And Health For 1973* 57-60 (G.P.O. 1975). Congress recognized that federal and state safety inspectors would be in short supply and that employee assistance in enforcing the Act would be critical to its effectiveness. See, *e.g.*, S. Rep. No. 91-1282, 91st Cong., 2d Sess. 11-12, 21-22 (1970) (Leg. Hist. 151-152, 161-162); H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 22, 31 (1970) (Leg. Hist. 852, 861). See also Pet. App. A12; Cohen, *The Occupational Safety and Health Act: A Labor Lawyer's Overview*, 33 Ohio St. L.J. 788, 799-802 (1972).

The bills, committee reports, and floor debates comprising the legislative history of the Act are collected in a Committee Print prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare entitled *Legislative History of the Occupational Safety and Health Act of 1970*, 92d Cong., 1st Sess. (1971). References to this document will be cited to "Leg. Hist." See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n, supra*, 430 U.S. at 445 n.1.

As petitioner concedes (Pet. Br. 17-18), a number of specific statutory provisions further this intent to involve employees in enforcement of the Act. Employees are entitled, for example, to challenge the validity of safety standards issued by the Secretary, to receive notice of and participate in proceedings regarding applications for variances from such standards, and to be advised of and participate in proceedings regarding citations for alleged violations of the Act. 29 U.S.C. 655, 658 and 659. Employees are also entitled to request inspections of the workplace, to talk privately with inspectors, and to accompany an inspector on his tour of the workplace. 29 U.S.C. 657.

In addition to these provisions of general applicability, the Act also provides for employee participation in stituations giving rise to imminent danger. Again, the Act authorizes the employee to request an inspection when he believes an imminent danger exists. 29 U.S.C. 657(f)(1). If, following the in-

spection, the inspector agrees that such a danger exists—*i.e.*, that there are "conditions or practices" in the workplace that "could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided" in the Act (see 29 U.S.C. 662(a))[11]—he must inform the affected employees and the employer of the danger and notify them that he is recommending that the Secretary seek injunctive relief. 29 U.S.C. 662(c). The Secretary may then bring an action to restrain the conditions or practices giving rise to the imminent danger. The court may order the employer to avoid, correct, or remove the danger or prohibit the employment of individuals in the area. 29 U.S.C. 662(a). If the Secretary arbitrarily or capriciously fails to seek injunctive relief, an employee or employee representative may bring a mandamus action to compel the Secretary to do so. 29 U.S.C. 662(d).

Given the availability of these detailed statutory procedures, the Secretary's regulations explicitly acknowledge that, "as a general matter, there is no

[11] The normal method of enforcement is for the Secretary to issue a citation of an alleged violation and to fix a reasonable time for abatement of the violation. 29 U.S.C. 658(a). However, if the employer contests the citation, the effective date of the abatement order is postponed until after the completion of all administrative proceedings, including a hearing before an administrative law judge and review by the Commission. 29 U.S.C. 659(b) and (c). As the present case reflects, this process may be protracted. See note 3, *supra*.

right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions." 29 C.F.R. 1977.12(b)(1). The regulation continues:

> Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

The Act does not expressly explain, however, what an employee is expected to do when, as in the present case, he has sought unsuccessfully to have his employer abate the dangerous condition and there is insufficient time, due to the urgency of the situation, to eliminate the danger by requesting an inspection by the Secretary with a view toward injunctive relief. Petitioner argues that the silence of the Act on this point is dispositive and that Congress must have intended that the employee abide by his employer's directions until the Secretary obtains a court order under 29 U.S.C. 662(a). Under petitioner's analysis,

the employer would be free to discipline an employee who refused to work while waiting for the inspector to arrive. Indeed, the employer could presumably even discipline an employee who refused to work *after* the inspector had assessed the situation, agreed that there was an imminent danger, and notified the employee and employer of the danger and of his intention to recommend that the Secretary seek injunctive relief (see 29 U.S.C. 662(c)). This would be so, according to petitioner, because the judicial process expressly provided for in the Act (which petitioner argues was intended to be the exclusive remedy) would still not have been successfully invoked.

But the silence of the Act on the question of employee self-help under these narrow but critical circumstances is hardly a justifiable basis for fashioning a rule, such as the one petitioner proposes, that would be wholly at odds with the Act's express and overriding purpose to prevent death or serious physical harm as a result of employment. See 29 U.S.C. 651(b), 654(a)(1). The Act is prophylactic, not compensatory in nature. *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, *supra*, 430 U.S. at 444-445.[12] It was intended to "prevent the first accident."

[12] See also *United Parcel Service of Ohio* v. *OSHRC*, 570 F.2d 806, 812 (8th Cir. 1978); *Allis-Chalmers Corp.* v. *OSHRC*, 542 F.2d 27, 31 (7th Cir. 1976); *Brennan* v. *OSHRC*, 513 F.2d 1032, 1039 (2d Cir. 1975); *Lee Way Motor Freight, Inc.* v. *Secretary of Labor*, 511 F.2d 864, 870 (10th Cir. 1975); *Ryder Truck Lines, Inc.* v. *Brennan*, 497 F.2d 230, 233 (5th Cir. 1974).

The legislative history is replete with strong references to the Act's preventive purpose and the tragedy of each individual death or accident. See, *e.g.*, S. Rep. No. 91-1282, *supra*, at 2 (Leg. Hist. 142); 116 Cong. Rec. 37628 (1970) (Leg. Hist. 516) (Sen. Nelson); 116 Cong. Rec. 37628 (1970) (Leg. Hist. 518) (Sen. Cranston); 116 Cong. Rec. 37630 (1970) (Leg. Hist. 522) (Sen. Randolph); H.R. Rep. No. 91-1291, *supra*, at 23 (Leg. Hist. 853); 116 Cong. Rec. 38367 (1970) (Leg. Hist. 981) (Rep. Anderson); 116 Cong. Rec. 38386 (1970) (Leg. Hist. 1031) (Rep. Dent). The statement of Senator Yarborough, a sponsor of the Senate bill, is especially compelling:

> We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact.

116 Cong. Rec. 37625 (1970) (Leg. Hist. 510).

Lee Way Motor Freight, Inc. v. *Secretary of Labor*, 511 F.2d 864, 870 (10th Cir. 1975). Accord: *United Parcel Service of Ohio* v. *OSHRC*, 570 F.2d 806, 812 (8th Cir. 1978); *Allis-Chalmers Corp.* v. *OSHRC*, 542 F.2d 27, 31 (7th Cir. 1976). It would be of little solace to an employee who was injured while waiting for the OSHA inspector to arrive or for injunctive relief to be granted that the inspector or the court might subsequently agree that the employee was indeed confronted with immediate peril, that the immediate peril should be corrected in the future, or that the employee should receive workmen's compensation or other relief for the injuries sustained when he followed his employer's instructions.

Nor does the Act furnish any basis for petitioner's underlying premise that employees confronted with what to them appears to be a situation of imminent danger should trust the determination of their employer that no such danger exists or that they should

continue to work in the face of the danger. Congress fully appreciated that employees would often be in the best position to identify hazardous conditions at the workplace (see, *e.g.*, S. Rep. No. 91-1282, *supra*, at 11 (Leg. Hist. 151); 116 Cong. Rec. 37340 (1970) (Leg. Hist. 430) (remarks of Sen. Williams)) and, accordingly, the Act reflects an unmistakable purpose and design to involve employers *and* employees in its implementation and enforcement. See pages 30-32, *supra*. Moreover, the employee runs a grave risk—and the very one OSHA was intended to prevent—if he works under circumstances covered by the regulation; the employer, on the other hand, may lose little or nothing by acquiescing in the employee's temporary refusal.[13] In the present case, for example, petitioner, at little or no inconvenience, could have allowed Deemer and Cornwell to clean the guard screens from the Verta-Lift pursuant to the established company policy or could have assigned them to do other work that they routinely performed. Nothing in the Act or its legislative history suggests that the employee's judgment and concern for safety must always give way to what might be the employer's quite different judgment and concerns in a situation of immediate peril in which, by the terms of the regulation, the neutral offices of the Secretary

[13] An OSHA inspector is ordinarily expected to inspect a jobsite allegedly containing a condition of imminent danger within 24 hours of notification. OSHA *Field Operations Manual*, ch. IX, 1 ESHG (CCH) § 4370.3 (Jan. 1979) Any loss to the employer is therefore likely to be very brief, minimal and of short duration.

and the courts are temporarily unavailable to resolve the disagreement.

What is more, even if a company has a general policy that would not require employees to submit to hazardous working conditions, the regulation nevertheless furnishes needed protection where a lower level supervisor—perhaps because of pressure to produce or personal animus toward an employee—countermands the company's policy and orders the employee to work despite the imminent danger. This case offers a good illustration: although petitioner attempts to demonstrate its corporate good faith with respect to the guard screens (Pet. Br. 36-45), it does not explain what practical value this laudable corporate policy was to Deemer and Cornwell when the foreman disregarded the policy and directed them to work on the screen frames.

It is also important not to lose sight of the dilemma in which an employee covered by 29 C.F.R. 1977.12 (b) (2) finds himself. Assuming, as the regulation requires, that the employee has a good faith and reasonable fear of death or serious injury, it would be contrary to all principles of fairness, not to mention human nature, to demand that the individual submit to the danger. This Court has acknowledged that the refusal by employees to work under adverse conditions far less threatening to life and limb than those to which the regulation is addressed is a "perfectly natural and reasonable thing to do." *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 16 (1962). Surely, then, a refusal to work under the far more aggra-

vated circumstances contemplated by the regulation is "unquestionably activit[y] to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours." *Id.* at 17.

The Court's decision in *NLRB* v. *Washington Aluminum Co.*, *supra*, and the Secretary's recognition in this case of an employee's right to be free of employer sanctions when he responds in the only way a humane society can expect—by refusing to submit to the danger—are consistent with principles of necessity in our jurisprudence generally. A defense of duress or necessity has long been recognized in the criminal law where a person has been compelled by external forces, natural or human, to engage in prohibited conduct. Although the conduct remains criminal, it is excused because it is better for the individual to choose the lesser evil of violating the law in order to avoid the greater evil with which he is threatened. W. LaFave & A. Scott, *Handbook on Criminal Law* § 49, at 374 (1972). "[I]t is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion." 4 W. Blackstone, *Commentaries on the Laws of England* 27 (1897). So too here, enactment of OSHA must be taken as a legislative judgment that death or serious injury is a greater evil that is legitimately avoided by resort to the lesser evil of temporarily violating an employer's instructions to work. To this extent, and where no alternatives are available, the employee must be excused from liability for disobeying the employer's directive.

Indeed, the limitations in 29 C.F.R. 1977.12(b)(2) closely parallel the judicially fashioned restrictions on the availability of the duress defense under the criminal law. First, as under the duress defense, the circumstances prompting the refusal to work must induce a *reasonable* fear of death or serious bodily harm,[14] and the threat must be *immediate*. See 1 W. Burdick, *Law of Crime* § 199, at 262-263 (1946); W. LaFave & A. Scott, *supra*, § 49, at 377-378. Second, the person must have no reasonable opportunity to avoid the threatened harm by resort to lawful means—under the regulation, by seeking to have the condition corrected by the employer or by resort to statutory procedures. Compare W. LaFave & A. Scott, *supra*, § 49, at 377. The duress defense under the criminal law also requires that the threat last for the duration of the conduct sought to be excused. See, *e.g.*, *Respublica* v. *McCarty*, 2 U.S. (2 Dall.) 86 (Pa. Sup. Ct. 1781). Similarly, under 29 C.F.R. 1977.12(b)(2), the employee would not have a protected right to continue to resort to self-help measures after he had a reasonable opportunity to invoke statutory enforcement procedures or after those procedures have run their course without affording relief.

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[14] Thus, petitioner is simply wrong in suggesting (Pet. 2) that the regulation affords protection from retaliation on the basis of the employee's subjective fear of danger. See note 18, *infra*.

B. The Regulation Is a Reasonable Measure for Implementing the Antidiscrimination Prohibition in Section 11(c)(1) and for Carrying Out the Secretary's Responsibilities Under the Act

In addition to recognizing a personal right implicit in the Act for an employee to absent himself from what he reasonably believes to be perilous conditions, the regulation is also an appropriate measure in aid of the Secretary's investigative and enforcement responsibilities and in aid of the policies of the antidiscrimination prohibition in Section 11(c)(1) of the Act, 29 U.S.C. 660(c)(1).

As noted above (see page 26, *supra*), the Secretary is empowered to "prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under the Act." 29 U.S.C. 657(g)(2). Among the Secretary's responsibilities, and central to this case, is his duty to conduct investigations of alleged imminent dangers and to seek injunctive relief if the employer does not abate the condition voluntarily. 29 U.S.C. 657(f)(1) and 662(a). Because of the shortage of investigators (see note 10, *supra*) and the remoteness of the possibility that an investigator would be at a workplace at the moment an imminent danger is perceived, it is evident that the Secretary must depend on employees to notify him of imminent hazards that the employer declines to correct. Compare *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). In these and other situations, Section 11(c)(1) prohibits an employer from retaliating against his employees for furnishing information or otherwise cooperating with the Secretary, in order "to prevent the [Secretary's]

channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972), quoting *John Hancock Mut. Life Ins. Co.* v. *NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951). As with other remedial provisions, the Court has held that such antidiscrimination provisions must be liberally construed to effectuate fully their intended purpose. *NLRB* v. *Scrivener*, *supra*, 405 U.S. at 124; *Mitchell* v. *Robert DeMario Jewelry, Inc.*, *supra*, 361 U.S. at 292-293.

A refusal to work in the face of imminent danger will generally be intimately bound up with the process of contacting an OSHA representative to request an investigation and injunctive relief. Even the Fifth Circuit in *Marshall* v. *Daniel Construction Co.*, *supra*, conceded that an employee would be protected by Section 11(c)(1) from employer retaliation for absenting himself from duty for the limited time necessary to notify the authorities about an imminently dangerous condition. 563 F.2d at 716. Once existence of this right is conceded, as it must be, it would be anomalous to conclude that the employee may not, as an incident to invoking the statutory procedure, continue to absent himself from the hazardous condition until the inspector arrives and until the inspector informs him either that he will recommend that the Secretary seek injunctive relief or that he believes no imminent danger is present (see Pet. App. A13).[15] Surely an employer would be

[15] The subsequent failure by the Secretary to seek or obtain injunctive relief would not, of course, be determinative of the

barred by Section 11(c)(1) (and perhaps be liable for contempt of court if he did so) from disciplining an employee who refuses to work *after* a court has issued an order restraining the dangerous condition. As the Court pointed out in a related context:

> It would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time.

NLRB v. *Scrivener*, *supra*, 405 U.S. at 124. Indeed, it is especially important to recognize an employee's right to decline to perform a hazardous task while awaiting arrival of an OSHA investigator because of the significant potential during this period for the employer to insist that the employee work in retaliation for his having contacted the authorities. The Secretary's regulation does not afford the employee protection unless he first seeks to correct the dangerous condition by calling it to the employer's attention. The employer's refusal to correct the condition, despite the employee's complaint, would suggest a situation of strained relations in which protection of the employee would appear to be particularly essential.

Similarly, recognizing a right to refuse to work when the OSHA inspector is not available is also

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question whether the employee reasonably believed at the time he refused to work that he was confronted with an imminent peril.

necessary to ensure that the employer does not insist that the employee perform a dangerous task out of anger for the employee's having complained about the allegedly unsafe condition and perhaps having stated an intention to contact the authorities when the opportunity arose. The Secretary's regulations provide in this regard that an employee's complaining to his employer about unsafe conditions is protected by Section 11(c)(1), even though this right is not expressly mentioned in that section or elsewhere in the Act. 29 C.F.R. 1977.9(c). See *Marshall* v. *P & Z Co.*, 1978 OSHD (CCH) ¶ 22,579 (D.D.C. 1978), aff'd mem., 600 F.2d 280 (D.C. Cir. 1979); *Marshall* v. *Springville Poultry Farm, Inc.*, 445 F. Supp. 2 (M.D. Pa. 1977); cf. *Baker* v. *Dept. of Interior Board of Mine Operations Appeals*, 595 F.2d 746 (D.C. Cir. 1978); *Phillips* v. *Dept. of Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974).

These considerations are quite relevant to the present case. Deemer, one of the complainants, had contacted an OSHA representative about the unsafe screens on the day before he refused to walk on them. Moreover, he had been furnished with the name and address of the OSHA representative only after receiving "veiled threats" by the plant safety director —threats that Deemer interpreted as an effort to discourage him from pursuing his statutory rights. See page 8, *supra*; Pet. App. A6. When, at 11 o'clock in the evening, Deemer and Cornwell were confronted with the foreman's order that they go on the screens, they could reasonably have concluded that an OSHA inspector would not be available to intercede and as-

sess the situation—a fact that the foreman and other of petitioner's management officials might reasonably have assumed as well. Recognition of a limited right to refuse hazardous work until the OSHA inspector is contacted and carries out his duties therefore ensures that the employer will not retaliate against the employee during a period when the employee's position is the most vulnerable and during which it may often be difficult to distinguish successfully between an employer's firing of an employee for refusing to work on the one hand and, on the other, for invoking his protections under the Act at a time when those protections are most urgently needed.[16]

Finally, recognizing a right to refuse hazardous work under the circumstances described in the regulation ensures preservation of the status quo in the manner most likely *not* to result in a serious accident, until such time as the Secretary has a reasonable opportunity to investigate and act. In this sense, 29 C.F.R. 1977.12(b)(2) is in aid of the Secretary's investigative and enforcement jurisdiction and is therefore justified as a regulation "necessary to carry out [his] responsibilities under the Act." 29 U.S.C. 657(g)(2). Under this view, the regulation is valid

[16] Moreover, if an employee who refuses to perform imminently hazardous work may be subject to discipline that would almost surely be viewed by his fellow workers as unreasonable under the circumstances, the fellow employees could be chilled in the exercise of their recognized right to file complaints with their employer or with OSHA about safety matters because of a fear that they would meet a similar fate. Cf. *American Broadcasting Cos.* v. *Writers Guild*, 437 U.S. 411, 433-436 (1978).

even if, contrary to our primary submission, an employee has no personal right under the Act to absent himself from conditions that he reasonably believes likely to cause death or serious bodily harm.

C. The Regulation's Recognition of a Limited Right to Refuse to Perform Hazardous Work is Consistent With the Policies of Federal Labor Legislation

Contrary to petitioner's suggestion (Pet. Br. 20), the regulation at issue in this case does not conflict with the policies reflected in other federal labor legislation. Under Section 7 of the National Labor Relations Act, 29 U.S.C. 157, employees have a protected right to strike over safety issues. See *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). Of course, the right recognized in the present regulation is far more limited. Individual employee self-help is protected only in the face of danger of death or serious bodily harm; concerted activity is protected under Section 7 of the NLRA without regard to an objective assessment of the seriousness of the health or safety issues. *NLRB* v. *Washington Aluminum Co.*, *supra*.[17]

[17] As the court of appeals pointed out (Pet. App. A19-A20 n.23), however, 29 C.F.R. 1977.12(b)(2) is not rendered unnecessary because of the protection afforded by Section 7 of the NLRA. The latter statute does not protect agricultural workers, supervisors, or several other types of employees covered by OSHA. 29 U.S.C. 152(3). In addition, the National Labor Relations Board declines to exercise jurisdiction over employers having a relatively minor impact on interstate commerce. There is, moreover, some question about the degree to which individual as opposed to group action is protected by Section 7, which addresses itself to concerted employee activity. Finally, individual or group action on safety issues may

In addition, Section 502 of the Labor Management Relations Act, 29 U.S.C. 143, provides protection in the specific context of hazardous working conditions. That section provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike." The section creates an exception to an express or implied no-strike obligation in a collective bargaining agreement. *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 385 (1974). Thus, in legislation governing labor-management relations generally, Congress has taken cognizance of the unique circumstances presented when employees are faced with serious safety hazards at the jobsite and has provided that such circumstances warrant the type of exceptional attention given them under 29 C.F.R. 1977.12(b)(2). It would be ironic, to say the least, if a statute passed for the specific purpose of protecting employee health and safety were construed to exclude such a right.[18]

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not be protected under Section 7 where the employees are represented by a union and the union does not support the activity. *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975). See generally Ashford & Katz, *Unsafe Working Conditions: Employee Rights Under The Labor Management Relations Act and the Occupational Safety & Health Act*, 52 Notre Dame Law. 802, 803-805 (1977). Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 Minn. L. Rev. 647 (1975).

[18] Amicus Chamber of Commerce contends (Amicus Br. 29, 34, 35) that the right afforded by 29 C.F.R. 1977.12(b)(2) differs from that afforded by Section 502 of the Labor Management Relations Act, 29 U.S.C. 143, because it immunizes the employee from employer sanctions on the basis of the employee's subjective belief that conditions are hazardous, whereas, under Section 502, a union must present "ascertainable, objective evidence suporting its conclusion that an abnormally dangerous condition for work exists." *Gateway Coal Co.* v. *United Mine Workers, supra*, 414 U.S. at 387. But, as noted above (see page 39, note 14, *supra*), the regulation by its terms states an objective test: it requires that the circumstances be such that a "reasonable person" would conclude that there is a real danger of death or serious injury.

Petitioner suggests, however, that 29 C.F.R. 1977.12(b)(2) departs from the pattern of existing labor legislation because it, unlike 29 U.S.C. 143 and 157, requires that an employer continue to pay an employee who refuses to work under hazardous conditions. This is simply untrue. Nothing in the regulation so provides, the Secretary has not so construed it, and no court (including the court below) has ever given the regulation that interpretation. There is likewise no reason for this Court to strain to give the regulation this broader reading, which would be in conflict with other labor legislation and the legislative history of OSHA (see pages 52-62, *infra*).[19]

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[19] Amicus Chamber of Commerce (Amicus Br. 23) bases its argument that 29 C.F.R. 1977.12(b)(2) confers a right to pay on the fact that the Secretary amended the regulations implementing Section 11(c)(1) of the Act in 1977 to require that an employee representative be paid when he accompanies an inspector on an inspection tour. 29 C.F.R. 1977.21. See 42 Fed. Reg. 47344-47345 (1977). This regulation has been upheld by the United States District Court for the District of Columbia. See *Chamber of Commerce* v. *OSHA*, 465 F. Supp. 10 (D.D.C. 1978), appeal pending, No. 78-2221 (D.C. Cir.); compare *Leone* v. *Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975). However, as explained in the regulation itself, the

Finally, as the court of appeals recognized (Pet. App. A36-A39), the administrative interpretation of Section 11(c)(1) set forth in 29 C.F.R. 1977.12(b)(2) is consistent with the interpretation given the parallel antidiscrimination provision in the Federal Coal Mine Health and Safety Act, 30 U.S.C. 801 *et seq.* In adopting amendments to that statute in 1977, Congress recast the antidiscrimination provision, 30 U.S.C. (Supp. I) 815(c)(1), in terms that are, for present purposes, quite similar to those of Section 11(c)(1). The Mine Safety provision confers on miners no express right to refuse to work under hazardous conditions. Nevertheless, the legislative history of the 1977 amendments unequivocally establishes that Congress intended the provision to protect "the refusal to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 95-181, 95th Cong., 1st Sess. 35 (1977); see also *id.* at 36; 123 Cong. Rec. S10287-S10288 (daily ed. June

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Secretary determined, after six years of administering the Act, that the right to receive pay under such circumstances is essential to guarantee a full flow of information and to ensure unfettered exercise of the walk-around right. Cf. S. Rep. No. 95-181, 95th Cong., 1st Sess. 28-29 (1977) (expressing congressional intent that antidiscrimination provision of the Federal Coal Mine Health and Safety Act be construed in the same manner). Thus, although an employee representative might be reluctant to exercise this important walk-around right, intended to benefit all workers at the jobsite, if he had to sacrifice pay when he did so, no additional incentive is needed for an employee to absent himself from conditions threatening to life or limb. Moreover, the legislative history of OSHA would weigh against finding a right to pay when an employee refuses to perform work. See pages 52-62, *infra*.

21, 1977); 123 Cong. Rec. H11663 (daily ed. Oct. 27, 1977). These expressions of congressional intent were no doubt based in large part on cases arising under the prior antidiscrimination provision in the Federal Coal Mine Health and Safety Act, 30 U.S.C. 820(b)(1), indicating that a miner had a "right to refuse to work under conditions believed in good faith to be dangerous." *Munsey* v. *Morton*, 507 F.2d 1202, 1209 n.58 (D.C. Cir. 1974); *Phillips* v. *Dept. of Interior Board of Mine Operations Appeals*, *supra*, 500 F.2d at 778-780;[20] cf. *Munsey* v. *Federal Mine Safety & Health Review Comm'n*, 595 F.2d 735, 743 (D.C. Cir. 1978).

Thus, the regulation involved in this case is consistent with the general pattern of labor legislation in the area of occupational safety and health.[21] This reinforces the court of appeals' conclusion that the right to refuse work under hazardous conditions when the statutory enforcement procedures cannot be successfully invoked may reasonably be implied in OSHA

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[20] The Senate Report cites both *Phillips* and the first *Munsey* decision with approval. S. Rep. No. 95-181, *supra*, at 36.

[21] Amicus Chamber of Commerce contends (Amicus Br. 30-36) that the Secretary's regulation will interfere with other established procedures designed to resolve safety disputes and with the collective bargaining process. However, the Department of Labor and the National Labor Relations Board have entered into a memorandum of understanding under which the two agencies coordinate their enforcement efforts under their respective statutes in order to avoid duplicative proceedings. 40 Fed. Reg. 26083 (1975). Moreover, Department of Labor regulations contemplate that deferral to contractual arbitration for resolution of safety-related complaints may be in order in appropriate cases. 29 C.F.R. 1977.18.

and constitutes an appropriate measure for the implementation of the Secretary's responsibilities under the Act. The regulation is therefore fully consistent with the legislative purpose of the Act "to balance the need of workers to have a safe and healthy work environment against the requirement of industry to function without undue interference." 116 Cong. Rec. 37342 (1970) (Leg. Hist. 435) (remarks of Sen. Williams).

II

NOTHING IN THE LEGISLATIVE HISTORY OF THE ACT SUGGESTS THAT CONGRESS INTENDED TO DENY EMPLOYEES THE PROTECTION AFFORDED BY THE REGULATION

Petitioner does not argue that 29 C.F.R. 1977.12 (b)(2) is inconsistent with the overriding purposes of the Act to prevent occupational injuries. Instead, petitioner relies almost exclusively—as did the Fifth Circuit in *Marshall* v. *Daniel Construction Co.*, *supra*, 563 F.2d at 712-715 on several portions of the legislative history of the Act that it contends reflect a congressional intent to deny the type of protection afforded by the regulation.

In light of the statutory foundation for the regulation, as discussed in Part I of this brief, only the clearest expression of congressional intent could overcome the underlying, inescapable conclusion that Congress, in enacting OSHA, could not have desired to put employees to the choice of either working under life-threatening conditions or being subject to retaliation by their employers, including possible loss of their jobs. Far from manifesting this clear congressional intent, however, the incidents relied upon by

petitioner do not even concern the question whether an employee must work under life-threatening conditions on pain of employer sanctions.

Three bills figure significantly in the legislative history. The Senate Committee on Labor and Public Welfare reported S. 2193, 91st Cong., 2d Sess. (1969) (Leg. Hist. 204-295) (the "Williams bill") to the full Senate. S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970) (Leg. Hist. 141). That bill passed the Senate with only a few changes (Leg. Hist. 528), and it became the basis in most respects for OSHA as finally enacted. The House Committee on Education and Labor reported H.R. 16785, 91st Cong., 2d Sess. (1970) (Leg. Hist. 893-976) (the "Daniels bill") to the full House. H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. (1970) (Leg. Hist. 831). This bill attracted greater opposition. Although Rep. Daniels offered on the House floor to amend his bill in several instances to make it more acceptable, the House instead passed a substitute bill, first introduced as H.R. 19200, 91st Cong., 2d Sess. (1970) (Leg. Hist. 763-830, 1092-1118) (the "Steiger bill"). See 116 Cong. Rec. 38723-38724 (1970) (Leg. Hist. 1112-1114). The Conference Committee adopted most of the provisions of the Williams bill. H.R. Cong. Rep. No. 91-1765, 91st Cong., 2d Sess. (1970) (Leg. Hist. 1194-1228).

Petitioner argues that the House's rejection of the Daniels bill in favor of the Steiger bill demonstrates a congressional intent to withhold protection from all refusals by employees to work. This is because the Daniels bill, unlike the Steiger bill, contained a provision permitting employees to decline to perform

work, but to continue to be paid, if they would be exposed to toxic substances at levels in excess of those established by the government as safe. Second, petitioner contends that the elimination of provisions in the Williams and Daniels bills that would have given an inspector employed by the Department of Labor the power to shut down a plant, without invocation of the judicial process, necessarily implies that Congress could not have intended to allow employees to absent themselves from dangerous working conditions on their own initiative without fear of reprisal.

Petitioner's claims are belied by the record. The two provisions were rejected in large measure because of a belief that they would constitute a major departure from the status quo in the area of labor management relations—in the first case, by requiring employers to pay workers who were withholding their services, and in the second, by creating the potential for thrusting a Labor Department inspector, acting unilaterally, into the middle of a dispute between management and labor. As discussed above, 29 C.F.R. 1977.12(b)(2) is not a departure from existing labor legislation. Moreover, the rejected provisions had other features that readily distinguish them from the regulation at issue here.

A. The "Strike with Pay" Provision

The Daniels bill, as reported by the House Committee, contained a section that was quickly termed a right to "strike with pay"—a label, in the Fifth Circuit's words, that "proved to be its epitaph."

Marshall v. *Daniel Construction Co.*, *supra*, 563 F.2d at 712.[22] This provision directed the Secretary of Health, Education, and Welfare to publish annually a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur. The Secretary would also have been required

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[22] Section 19(a)(5) of H.R. 16785, *supra*, as reported to the House floor, provided:

> The Secretary of Health, Education, and Welfare shall publish within six months of enactment of this Act and thereafter as needed but at least annually a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potentially toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education, and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substance designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees, by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, *or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period.*

See H.R. Rep. No. 91-1291, *supra*, at 12 (Leg. Hist. 842) (emphasis added).

to determine, at the request of an employer or authorized employee representative, whether any substance normally used in the workplace has potentially toxic or harmful effects in the concentrations used. Within 60 days of a determination by the Secretary that a substance was potentially toxic, an employer could not have required any employee to be exposed to the substance in toxic or greater concentrations unless he furnished the employee with information about its toxicity and with protective equipment "or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period." H.R. Rep. No. 91-1291, *supra*, at 12 (Leg. Hist. 842). The Committee Report explained the provision as follows:

> There is still a real danger that an employee may be economically coerced into self exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay.

H.R. Rep. No. 91-1291, *supra*, at 30 (Leg. Hist. 860).

The bill ultimately passed by the House did not contain a similar provision, nor did the Williams bill reported by the Senate Committee and passed by the full Senate. As a result, no such provision was included in OSHA as finally enacted. But Congress' failure to include the provision hardly supports petitioner here.

First, Section 19(a)(5) of the Daniels bill, unlike the regulation at issue in the present case, did not

address situations in which the employee reasonably believed that there was a real and imminent danger of death or serious injury. To the contrary, under the Daniels bill employees could have exercised the right to refuse to work and to be paid when they did so only after the employer had been given a period of *60 days* within which to develop appropriate warnings and protective measures to ensure that employees were not exposed to substances above toxic levels. If exposure to the substances identified by the Secretary of HEW as toxic presented an imminent threat of death or serious bodily injury, the Secretary of Labor would presumably have resorted to his emergency powers under Section 12 of the Daniels bill (Leg. Hist. 742) to counteract the dangers by issuing an administrative order or by seeking a temporary restraining order long before expiration of the 60-day period. Thus, Section 19(a)(5) of the Daniels bill necessarily dealt with situations that did *not* present an imminent and grave threat to health and safety. Congress' failure to enact Section 19(a)(5) therefore sheds little or no light on the measures to which Congress would have intended employees to resort, without fear of retaliation, if they *were* confronted with an imminent danger to life or limb.

Beyond this, it is clear that Congress' decision not to include a provision similar to Section 19(a)(5) of the Daniels bill was based on the fact that employees would have been entitled to draw their regular salary when they refused work after expiration of the 60-day period—or, as opponents of the Daniels

bill put it, to "strike with pay" (see Pet. App. A27-A28 & n.35).

To meet objections to the House Committee bill, Rep. Daniels proposed a number of amendments in the hope that the bill would prevail over the substitute bill Rep. Steiger intended to offer on the House floor. In place of the "strike with pay" provision, Rep. Daniels proposed the addition of a subsection that was eventually adopted as Section 8(f)(1) of the Act, 29 U.S.C. 657(f)(1) permitting an employee or employee representative who believes a violation of a health or safety standard exists that threatens physical harm or imminent danger to notify the Secretary and to request an immediate inspection. The Secretary must then inspect the workplace as soon as practicable if he concludes that there is reasonable cause to believe that a violation or danger exists. 116 Cong. Rec. 38377 (1970) (Leg. Hist. 1008-1009).[23] This suggested amendment to the House

[23] Section 8(f)(1), as enacted, 29 U.S.C. 657(f)(1), provides:

> Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

Committee bill was apparently drawn from Section 8(f)(1) of S. 2193, *supra*, which had passed the Senate the previous week (see Leg. Hist. 550). Rep. Daniels inserted a statement in the record explaining the amendment:

> The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employess will be subject to the risk of harm.

116 Cong. Rec. 38377-38378 (1970) (Leg. Hist. 1009).

Petitioner characterizes (Pet. Br. 29) Rep. Daniels' explanation of his proposed amendment as an assurance that, if it were adopted, the committee bill would "no longer contain[] a right to refuse work provision." But the explanation just quoted is quite

clearly limited to an assurance that the proposed amendment would delete any requirement that employees who absent themselves from risk of harm be *paid* by their employers when doing so.

The Steiger bill, which contained no "strike with pay" provision, was adopted as a substitute by the House before Rep. Daniels' suggested amendments to the committee bill were voted upon.[24] The Conference Committee approved the substance of the Senate language, which Rep. Daniels had previously proposed and which was eventually enacted as Section 8(f)(1), 29 U.S.C. 657(f)(1), providing for prompt inspection by the Secretary when physical harm or imminent danger to an employee is threatened. Thus, when it approved the Conference Committee report, the House effectively adopted the substance of the amendment Rep. Daniels had offered to the House Committee bill to ensure that employees would not be permitted to absent themselves from work *with pay*. There is no reason to assume that, in doing so, the House intended to go substantially beyond what Rep. Daniels had suggested and to permit employer retaliation against employees who refused to work in highly dangerous situations *without pay*.

What is more, as the court of appeals noted (Pet. App. A27-A28 & n.35), it is significant that *every time* the issue of an employee's right to absent himself from hazardous work was discussed in the legis-

[24] As the court of appeals pointed out (Pet. App. A22-A23 n. 26), the Daniels bill was opposed on a number of grounds, not merely because of the "strike with pay" provision.

lative debates, it was in the context of the receipt of compensation while doing so.[25] In the Senate, for example, Senator Williams stressed that his bill did

[25] Petitioner erroneously asserts that isolated remarks by Rep. Cohelan and Rep. Steiger belie this statement by the court of appeals and demonstrate that Congress rejected the "philosophy which now is embodied in the Secretary's regulation" (Pet. Br. 27 & n.20). Rep. Cohelan stated that the Daniels bill authorized "the worker to leave his post whenever and wherever conditions exist that endanger his health or safety." 116 Cong. Rec. 38375 (1970) (Leg. Hist. 1001). But read in context, it is clear that Rep. Cohelan's statement was referring to the strike *with pay* provision, and there is no reason to believe he was likewise referring to a narrower right to leave hazardous conditions without pay. In any event, such a casual description by an individual member of Congress who was neither a sponsor of the Daniels bill nor a member of the committee that considered it is entitled to little weight. *Cf. National Woodwork Mfgrs. Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951). See generally 2A Sutherland, *Statutory Construction* § 48.13 (C. Sands 4th ed. 1973).

Petitioner also refers (Pet. Br. 26) to the statement of a speaker, listed in the Congressional Record as Rep. Steiger, that his bill does not authorize "strikes without pay." 116 Cong. Rec. 38708 (1970) (Leg. Hist. 1075). This remark is either a misprint or a misstatement, because the context again shows that the speaker was referring to the "strike with pay" provision of the Daniels bill. In either case, no relevant inference can be drawn. At least one misprint does occur in this passage: the speaker is unmistakably Rep. Perkins, Chairman of the House committee that reported the Daniels bill, not Rep. Steiger, whose substitute bill the speaker is vigorously attacking. In context, it is apparent that Rep. Perkins is merely restating the position, frequently voiced by the Daniels bill's supporters, that the "strike with pay" provision had been misunderstood, but that the committee bill would nevertheless be amended to delete it.

not contain a provision similar to Section 19(a)(5) of the Daniels bill:

> I should also add, despite some widespread contentions to the contrary, that the committee bill does not contain a so-called strike-pay[26] provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection.

116 Cong. Rec. 37326 (1970) (Leg. Hist. 416).

As the court of appeals observed (Pet. App. A28), it is understandable that Congress would have been concerned about "the monetary incentive that workers would have by claiming that they believed a situation was hazardous and then sitting back and collecting their paychecks for doing nothing." Not only would this have created the potential for a distracting dispute over pay when the true focus should be on the dangerous working conditions; it would also have altered the balance in labor-management relations by introducing a powerful economic weapon for use, and perhaps misuse, against the employer. These concerns do not apply with respect to the regulation involved in this case: 29 C.F.R. 1977.12(b) does not provide for the payment of employees who refuse to perform hazardous work, and it does not present the potential for distracting disputes over an

[26] The passage in the Congressional Record reads "strike-pay provision;" the passage in the bound legislative history reads "strike-with-pay provision."

entitlement to compensation or arm employees or unions with the economic weapon of a "strike with pay." [27]

As is evident from this brief discussion, the legislative history furnishes no basis for arguing that Congress, in declining to include a provision similar to Section 19(a)(5) of the Daniels bill, intended to do anything more than to preclude what had been termed a right to "strike with pay." Apparently recognizing this, petitioner argues (Pet. Br. 19-20, 35-36) that 29 C.F.R. 1977.12(b)(2) should be con-

[27] The House Committee report indicated that under Section 19(a)(5) of the Daniels bill, an employer could reassign other work to any employees who were entitled to pay when they refrained from being exposed to toxic substances. See H.R. Rep. No. 91-1291, *supra*, at 30 (Leg. Hist. 860). This ability to reassign employees, "except as [the employer] is obligated under other agreements" (*ibid.*), could have enabled the employer under certain circumstances to avoid paying for work not performed.

Contrary to the contention of Amicus Chamber of Commerce (Amicus Br. 23), this explanation of the possible operation of the so-called "strike with pay" provision is not the equivalent of 29 C.F.R. 1977.12(b)(2). Under Section 19(a)(5) of the Daniels bill, an employer would have been required to pay his employees *in all instances*, even if he did not or could not reassign them, and the language in the committee report, quoted above, would presumably have automatically precluded the employer from reassigning employees where a collective bargaining agreement posed an obstacle. Under 29 C.F.R. 1977.12(b)(2), on the other hand, the employer has no such underlying obligation to pay employees who refuse to perform hazardous work, and he is not required to furnish them with other work unless, as in the present case, the employer could normally have been expected to reassign the employees and his failure to do so must therefore be viewed as discrimination or retaliation for the exercise of the right to refuse to perform a particular dangerous task.

strued to confer a right to receive pay when no work is performed. But as we have pointed out above (see page 47, *supra*), nothing on the face of the regulation suggests that it confers such a right, and the Secretary and the courts have never construed it in that manner. Accordingly, there is no inconsistency between the regulation and whatever inferences may properly be drawn from Congress' refusal to include a "strike with pay" provision in the Act.

B. The Imminent Danger Provision

Petitioner also argues (Pet. Br. 25-32) that the legislative history of Section 13 of the Act, 29 U.S.C. 662, which prescribes the procedures that the Secretary must follow in counteracting conditions or practices that present an imminent danger to employee health or safety, manifests a congressional intent that is inconsistent with the regulation protecting the right of employees to absent themselves from imminent danger. A review of the legislative history of Section 13 demonstrates, however, that Congress deleted the authority for individual Labor Department inspectors to order the closing of imminently hazardous work-sites because of concern that this authority might inject the Secretary into private labor disputes and because of a belief that government-ordered work stoppages should be accompanied by substantial procedural protections.

Section 13(a) of the Act, 29 U.S.C. 662(a), provides that the United States district courts shall have jurisdiction, upon petition of the Secretary, to re-

strain any conditions or practices in any place of employment that create a danger that could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the danger can be eliminated through the ordinary enforcement procedures under the Act. The court is empowered to order measures to avoid, correct, or remove the danger or to prohibit the employment of persons in the area.

The Daniels and Williams bills, as reported by the House and Senate committees, allowed the Secretary or his representative to order similar relief administratively, without invoking the judicial process. H.R. 16785, *supra*, Section 12(a) (Leg. Hist. 955-956); S. 2193, *supra*, Section 11(b) (Leg. Hist. 263-264). The administratively ordered cessation of work could have continued for up to five days under the Daniels bill and 72 hours under the Williams bill. Congress deleted these provisions from the bill eventually enacted.

Resistance to the proposals permitting the closing of workplaces by administrative order surely was not based on an affirmative desire to keep employees on the job in the face of apparent safety hazards or even, as petitioner suggests (Pet. Br. 32), to ensure that work would never cease, regardless of imminent danger, unless ordered by a court. Rather, the opposition to this provision centered exclusively on Congress' reluctance to give a Labor Department inspector or other *government official* the unilateral au-

thority, without resort to the judicial process, to order corrective measures by the employer or the removal of employees from the danger area. This power appeared to be all the more awesome because, under the Williams and Daniels bills, the inspector could effectively have closed down an entire plant or operation for a period of three or five days.[28]

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[28] The legislative history contains a number of references by opponents of the provision to the administratively-ordered closing of an entire plant or place of employment. See, *e.g.*, H.R. Rep. No. 91-1291, *supra*, at 47, 55-56 (Leg. Hist. 877, 885-886) (minority views); S. Rep. No. 91-1282, *supra*, at 60, 63 (Leg. Hist. 199, 202) (individual and minority views). See also 116 Cong. Rec. 37624-37625 (1970) (Leg. Hist. 508) (adoption of amendment to Senate bill requiring concurrence of Secretary or other presidential appointee in Labor Department before issuance of administrative order "to close a business or plant, in whole or in substantial part"). Compare 116 Cong. Rec. 37603 (1970) (Leg. Hist. 456) (remarks of Sen. Saxbe) ("No one would disagree" with inspector's closing a single machine, as distinguished from an entire plant).

Under 29 C.F.R. 1977.12(b)(2), only the particular employees who reasonably fear death or serious bodily injury are protected from employer discipline if they decline to perform their assigned tasks; the regulation affords no protection to others who leave their jobs in sympathy. In the present case, the refusal by Deemer and Cornwell to walk the screens in petitioner's plant had no effect on the operations of the plant generally and did not result in other employees' being thrown out of work. The effects of the two complainants' refusal to perform a specific hazardous task were therefore far removed from the type of plant-wide disruptions that had generated opposition in Congress. See *Usery* v. *Babcock & Wilcox Co.*, *supra*, 424 F. Supp. at 757; Note, *The Occupational Safety and Health Act of 1970: The Right to Refuse to Work Under Hazardous Conditions*, 1979 Wash. U. L. Q. 571, 587-588.

Thus, five members of the House Committee on Education and Labor filed minority views objecting to the administrative shut-down authority, among other provisions of the Daniels bill reported by the Committee, because it gave "extreme power to one person" (H.R. Rep. No. 91-1291, *supra*, at 55 (Leg. Hist. 885). They predicted that the "all powerful inspector would become a pawn in labor disputes":

> The great potential for misuse that would be created if this power were put into the hands of an inspector in the field was amply demonstrated during the public hearings. The testimony reflected fears that pressure would be brought to bear upon federal inspectors to shut down plants in cases other than *bona fide* imminent danger situations. Thus, this unrestricted power in one person would realistically find itself in the middle of labor-management disputes. It would be far simpler for a disgruntled employee to pass by established labor-management grievance procedures and complain to a federal safety inspector that unsafe conditions existed when the real basis of a dispute was properly a labor-management problem, to be settled by established collective bargaining methods.

H.R. Rep. No. 91-1291, *supra*, at 56 (Leg. Hist. 886).[29] These minority members also asserted that

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[29] The minority members referred to testimony submitted at the hearings on the Daniels bill describing a situation in which employees at a refinery went on strike, after which the company attempted to keep the plant open through use of management personnel. The union then filed a complaint with the Secretary requesting an investigation of the safety of the plant when it was operated with less than a full crew,

the administrative shut down power amounted to "summary punishment which is contrary to our established standards of law" (*ibid.*).[30]

Similar arguments were presented against the provision on the Senate side. Senator Tower argued that "[t]he enormous amount of power given to the Secretary of Labor could easily be abused, culminating in a breakdown of existing Government neutrality in labor-management relations." 116 Cong. Rec. 37346 (1970) (Leg. Hist. 448). Senator Schweiker urged that due process, through resort to the judicial

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thereby raising the potential of the loss of government contracts under the Walsh-Healey Act, 41 U.S.C. 35(e). See *Occupational Safety and Health Act of 1969: Hearings on* H.R. 843, H.R. 3809, H.R. 4294, H.R. 13373 *Before the Select Subcomm. on Labor of the House Comm. on Education and Labor,* 91st Cong., 1st Sess. (Part II). 1021, 1025-1026 (1969).

[30] See also 116 Cong. Rec. 38372 (1970) (Leg. Hist. 992) (remarks of Rep. Steiger) (substitute bill not containing administrative shut-down provision ensures "due process"); 116 Cong. Rec. 38393 (1970) (Leg. Hist. 1050) (remarks of Rep. Mitchell) (Daniels bill "disregards constitutional due process; puts unreasonable power and authority in the hands of inspectors, many of whom might be incompetent or easily influenced"); 116 Cong. Rec. 38394 (1970) (Leg. Hist. 1052) (remarks of Rep. Broomfield) ("The Daniels bill gives this power to a Labor Department inspector who unfortunately may choose to shut down a plant arbitrarily and may be influenced by business or union pressure"); 116 Cong. Rec. 38704 (1970) (Leg. Hist. 1062) (remarks of Rep. Sikes) ("Secretary of Labor could arbitrarily take action to shut down a plant"); 116 Cong. Rec. 42203 (1970) (Leg. Hist. 1210) (remarks of Rep. Daniels) (House conferees insisted on deletion of administrative shut-down authority "cognizant of the concern of * * * Members over arbitrary action by inspectors").

process, should be followed before closing down a plant. 116 Cong. Rec. 37602 (1970) (Leg. Hist. 453-454). And Senator Saxbe offered an amendment to delete the administrative shut-down provision, arguing that a single inspector should not be empowered to close a business and temporarily put perhaps hundreds of employees out of work and that only a third party with a disinterested and objective viewpoint—a court—should make such an important decision. 116 Cong. Rec. 37602 (1970) (Leg. Hist. 452-453).[31]

The House of Representatives voted to substitute the Steiger bill, which did not contain an administrative shut-down provision, for the Daniels bill, which did.[32] On the Senate floor, Senator Williams, in an

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[31] See also 116 Cong. Rec. 37388 (1970) (Leg. Hist. 425) (remarks of Sen. Dominick) ("an order, without any court findings, without any adjudication, without any due process"); 116 Cong. Rec. 37625 (1970) (Leg. Hist. 508) (remarks of Sen. Javits) (expressing a need "further to protect against arbitrary closedowns"); 116 Cong. Rec. 41763 (1970) (Leg. Hist. 1149 (remarks of Sen. Prouty) (conference report eliminates Secretary's power to "arbitrarily shut down the operations of an employer").

[32] In order to make the House Committee bill more acceptable to supporters of the Steiger substitute, Rep. Daniels offered to propose an amendment to the committee bill deleting the authority for administrative closing orders. 116 Cong. Rec. 38707 (1970) (Leg. Hist. 1071). This and his other suggested amendments were never considered by the House because the Steiger bill was substituted for the Daniels bill on the floor. 116 Cong. Rec. 38715-38724 (1970) (Leg. Hist. 1092-1114).

effort to allay the concerns of those who feared placing substantial power to order drastic action in low-level administrative personnel, agreed to an amendment providing that approval by a Labor Department official appointed by the President would be required before a plant could be closed in whole or substantial part. 116 Cong. Rec. 37624-37625 (1970) (Leg. Hist. 508-509).[33] This amendment was included in the Senate bill. 116 Cong. Rec. 37636 (1970) (Leg. Hist. 563). However, the House conferees, "cognizant of the concern of [House] Members over arbitrary action by inspectors," 116 Cong. Rec. 42203 (1970) (Leg. Hist. 1210) (remarks of Rep. Daniels), insisted on deletion of even this more limited provision in the Senate bill. The Senate conferees receded on the point, H.R. Conf. Rep. No. 91-1765, 91st Cong., 2d Sess. 40 (1970) (Leg. Hist. 1193), and the Act as passed contained no such provision.

The regulation at issue in this case raises none of the concerns that led Congress to reject the provision for administratively-ordered shut-downs. The regulation does not create the potential for substantial financial injury to employers and lost work days to employees resulting from arbitrary and unilateral action by a single government inspector, who might

[33] The Williams bill reported by the Senate Committee already contained a provision designed to meet some of the criticism of vesting too much power in individual inspectors. Section 11(b) of S. 2193, *supra*, as reported, required approval of the Regional Director of the Labor Department before issuance of an administrative closing order. See Leg. Hist. 264; S. Rep. No. 91-1282, *supra*, at 13 (Leg. Hist. 153).

be inexperienced or subject to pressure. The regulation does not enable the government to compel the closing of a plant or the cessation or disruption of any operations without obtaining a court order.

Nor does the regulation raise the spectre of involving the Secretary of Labor or safety inspectors as "pawns" in labor disputes through the issuance of administrative orders. To the contrary, the decision by one or more employees to refuse to work in the face of hazardous working conditions is a personal one and constitutes the exercise of employee rights that have long been protected under federal labor law. *Gateway Coal Co.* v. *United Mine Workers*, *supra*, 414 U.S. at 385; *NLRB* v. *Washington Aluminum Co.*, *supra*. See also Pet. App. A3; *Marshall* v. *Daniel Construction Co.*, *supra*, 563 F.2d at 721-722 (Wisdom, J., dissenting).

Moreover, the employee who absents himself from a dangerous condition must do so at his own risk, because he cannot know in advance whether his actions will subsequently be viewed by the Secretary or the courts as having been reasonable and in good faith under the regulation. See Pet. App. A36. This factor inevitably introduces an element of caution into employee self-help measures under the regulation that would have been wholly lacking under the rejected provisions for administratively-ordered closings. Under the provisions rejected by Congress, an employee or union could have pressured an inspector to issue an unreasonable administrative order shutting down the plant and then, presumably, would

have been wholly insulated from any liabiilty when the inspector's order proved to be in error.[34]

Finally, the regulation raises none of the due process concerns voiced by opponents of the administrative closing provision. Although those concerns may arise in connection with a government-ordered shut down, "[p]rivate employees may refuse to work without violating due process." *Marshall* v. *Daniel Construction Co., supra,* 563 F.2d at 721 (Wisdom, J., dissenting). And, unlike the inspector in the committee bills, an employee who walks off the job cannot order the employer to make corrections on the spot. *Id.* at 720; Pet. App. A35. The mechanism for enforcement of the regulation fully comports with due process. An employer who does not believe that the task or conditions that induced the employee to refuse to work were truly dangerous is free to test his belief by discharging or otherwise disciplining the employee (subject to whatever restraints are imposed by the collective bargaining agreement). Under the regulation and the Act, the employer will suffer no sanction for doing so unless and until the government proves its case in court (Pet. App. A35).

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[34] The Daniels bill, as reported by the House Committee, contained a provision that would have allowed an employer or employee injured by the Secretary's arbitrary or capricious issuance of or failure to issue an order to cease operations to sue in the Court of Claims to recover damages for the injuries sustained. H.R. 16785, *supra,* Section 12(c) (Leg. Hist. 743). But this provision would have created no disincentive for individual employees or a union to urge the Secretary to issue an administrative closing order for insufficient or improper reasons.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

CARIN A. CLAUSS
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for Occupational Safety and Health

LOIS G. WILLIAMS
Deputy Associate Solicitor for Special Litigation

DENNIS K. KADE
Assistant Counsel for Appellate Litigation

THOMAS L. HOLZMAN
JOSEPH M. WOODWARD
Attorneys
Department of Labor

DECEMBER 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 307246 163

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1870

WHIRLPOOL CORPORATION,

Petitioner,

vs.

RAY MARSHALL, SECRETARY OF LABOR,

Respondent.

REPLY BRIEF OF PETITIONER.

ROBERT E. MANN,
RONALD J. HEIN, JR.,
Attorneys for Petitioner,
Whirlpool Corporation.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON,
55 East Monroe Street, Suite 4200,
Chicago, Illinois 60603,
(312) 346-8000,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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REPLY BRIEF OF PETITIONER.

I.

THE SECRETARY'S REGULATION GOES BEYOND HIS REGULATORY AUTHORITY AND IS INCONSISTENT WITH THE STATUTORY PURPOSES.

The Secretary argues that (1) the regulation[1] is within his regulatory powers, and (2) his regulation is "consistent with the purposes of the statute" and therefore should be upheld (Resp. Brief, pp. 26-40). Neither premise is valid.

The regulation patently is *ultra vires* and will defeat the legislative purposes set forth in this balanced statute by fostering disharmony in the workplace, discouraging cooperative efforts

1. The regulation at issue is published at 29 CFR § 1977.12 and purports to interpret Section 11(c)(1) of the Occupational Safety and Health Act of 1970 (29 U. S. C. § 660(c)(1)).

to improve safety of working conditions, creating potential conflicts among judicial and administrative determinations, and wasting the resources of all concerned.

A. The Secretary's Regulatory Authority Is Confined to Implementation of His Own Responsibilities.

Section 11(c)(1) of the Act does not include any statement of regulatory authority.[2] The Secretary premises this regulation upon the regulatory authority granted him under Section 8 of the Act which deals with inspections and investigations. Paragraph 8(g)(2) provides:

> "The Secretary and the Secretary of Health, Education and Welfare shall each prescribe such rules and regulations as he may deem necessary *to carry out their responsibilities under this Act,* including rules and regulations dealing with the inspection of an employer's establishment.
>
> 29 U. S. C. § 657(g)(2)
> (emphasis added)

The regulation in question purports to regulate the employment relationship by offering security to employees who refuse to perform work. The regulation applies, and was applied in this case outside any intervention by the Secretary.[3] The regulation therefore does not "carry out" any relevant responsibility of the Secretary under the Act. His responsibilities, relative to hazardous conditions, are to receive and investigate complaints, report results of the investigations, and initiate legal action as he deems appropriate. 29 U. S. C. §§ 657(f), 662.[4]

2. Section 11(c)(1) provides:

> "(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

3. The Secretary admits the Act provides no protection to an employee who stops working because of perceived hazard if normal enforcement procedures are available. 29 CFR § 1977.12(a); Resp. Brief, pp. 31-33. He argues, however, that such protections emerge whenever an OSHA inspector is not immediately available to assess allegations of imminent danger (Resp. Brief, pp. 33-36). In *this* case, however, the OSHA inspection already had been completed

(Footnote continued on next page.)

The Secretary and various Amici supporting the Secretary assert that the regulation is an attempt to fill a "gap" in the statutory scheme which Congress did not fill; they too thus recognize that the regulation is an attempt to amend the statute under guise of regulation.[5] However, in *Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, at 213 (1976), dealing with the extent of an administrative agency's authority to regulate the respective rights and responsibilities of private parties, this Court observed again:

> "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law."

See also Dixon v. *United States,* 381 U. S. 68, 74 (1965); *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S.

(Footnote continued from preceding page.)

and the OSHA area director had been contacted well *before* the work refusal. Moreover, the Complainants returned to work the following day, and have never contacted OSHA to conduct an emergency inspection; OSHA has never sought injunctive action, and the Complainants have never sought to force such action as is their right under Section 13. In plain fact, therefore, the Secretary is contending by his actions *in this case* that the employees have a protected right to stop working regardless of opportunities to invoke relief and/or regardless whether such opportunities have ever been or will ever be invoked. It is this attempt to create a Congressionally-denied "right" to stop working *per se* which Whirlpool is challenging.

4. In addition, the Secretary has the responsibility to promulgate and enforce standards to eliminate hazards, 29 U. S. C. §§ 655, 657, and to provide education and training programs to aid employers and employees recognize, avoid and prevent hazardous conditions, 29 U. S. C. § 670(c).

5. Brief of State of Minnesota, pp. 19-21; Brief of American Public Health Association, p. 8. Like the Secretary, the Amici argue that Congress was short-sighted in believing that the Section 13 Imminent Danger procedures would be adequate to deal with such conditions.

129, 134 (1936). Compare, *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U. S. 726, at 745 (1973), in which the Court observed that the general deference accorded administrative rulemaking:

> "must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction. . . ."

Authorities cited by the Secretary in support of his claim to broad regulatory power are inapposite (Resp. Brief, pp. 26-27). In *Marshall* v. *Barlow's Inc.*, 436 U. S. 307, 317, n. 12 (1978), the Court merely observed that the Secretary has "broad authority to prescribe such rules and regulations as he may deem necessary *to carry out his responsibilities under the* [*Act*]" (emphasis added phrase was omitted by the Secretary). *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 211-214 (1976) and the other cases referred to therein actually support Whirlpool's position, as indicated above. *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973) is completely inapposite because there the administrator had been granted by Congress unlimited authority to prescribe regulations, "as may be necessary to carry out the provisions of [the Act]." Here, the grant of authority merely to regulate as necessary to carry out the Secretary's responsibilities obviously is far narrower authority.

Section 8(g)(2) certainly is no grant of authority to define protected rights—stating, as it does, that the Secretary' regulatory authority covers only his responsibilities. The regulation thus should be rejected as being *ultra vires*.

B. The Regulation Does Not Further the Legislative Purpose.

Section 2(b) of the Act sets forth the Congressional purposes in enacting the legislation. The purposes include both Congress' objective to secure safe and healthful working conditions *and* the means by which Congress intended to achieve that

objective. A review of the legislative history reveals little opposition to legislation aimed at elimination of industrial hazards but does reveal that the various possible means to achieve that goal were hotly debated. Some proposed means—*e.g.*, procedures to set uniform national standards—ultimately were adopted; others, such as "strike with pay" and administrative shutdowns, were considered and rejected. Complainant's position that the regulation is in accord with the salutary objective of the Act fails to deal with the fact that Congress specifically decreed that the objective would not be achieved by means of encouraging employees to stop working, but would be achieved by other means; *i.e.*:

> (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;
>
> (2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;
>
> (3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act;
>
> (4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;
>
> (5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

29 U. S. C. § 651(b)(1)-(13)

As can be seen, the legislative purpose, expressed in the statute, plainly does not include any suggestion that Congress' goal was to be achieved by affording legal protection to employees who refuse to work. While one of Congress' purposes was to provide:

> "that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;"
>
> 29 U. S. C. § 651(b)(2)

Congress was careful to prescribe precisely what those responsibilities and rights were to be relative to imminent dangers. Congress engaged in extensive debate on that topic (Pet. Brief, pp. 21-34; Amicus Brief for Chamber of Commerce, pp. 19-25) and considered bills proposing a range of procedures including strikes with pay and administrative shutdown orders. What is now found in Sections 8(f)(1)[6] and 13 of the Act emerged from that debate as final resolution of the question.[7]

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6. U. S. C. §§ 657(f)(1).

7. 29 U. S. C. § 662 (titled, "Procedures to Counteract Imminent Dangers"). Contrary to the Secretary's representation, Whirlpool does not argue that the Section 11(c) antidiscrimination protections do not protect employees from disciplinary action taken because of exercise of the stated right to initiate or participate in OSHA investigations of imminent dangers. Therefore, the Secretary's reliance on opinions such as *NLRB* v. *Scrivener*, 405 U. S. 117 (1972) are misdirected. Compare, *Davis* v. *Boise Cascade Corp.*, ... N. W. 2d ..... (Minnesota Supreme Court No. 49660, Dec. 7, 1979) cited by Amicus State of Minnesota (Amicus Brief, p. 5, footnote 8) and said to hold that a work stoppage unrelated to initiation of enforcement procedures would be deemed unprotected. In this case, however, the regulation was applied to a work refusal *per se*, without regard to implementations of the Secretary's procedures. In fact,

(Footnote continued on next page.)

Because the Section 13 procedures exist and because they were enacted as a compromise of extreme positions including that of protecting work refusals, it is untenable to suggest that Congress' purpose included a conveyance of authority to the Secretary by regulation to protect work stoppages as a means to counter imminent dangers—indeed, as the Secretary would have it, an "implied authority" to recognize an "implied right." Respondent's position simply rests on too many implications in the face of an express and detailed statement of a contrary Congressional purpose to deal with imminent dangers via prompt investigation and judicial process.

The regulation is thus not supported by the statement of purposes and quite clearly is an attempt by the Secretary to expand upon the means ultimately chosen by Congress to achieve its legislative goal. It is inconsistent with those means chosen by Congress—as shown at least by the fact that Congress rejected it during deliberations on the statute—and inconsistent with the reality that industrial strife is not the best way to achieve safe and healthful working conditions. This Court noted in *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U. S. 368 at 379 (1974):

> "Relegating safety disputes to the arena of economic combat offers no assurance that the ultimate resolution will ensure employee safety."

Congress, in accord with the *Gateway* rationale that safety questions ought to be resolved by means other than industrial combat, determined in the context of OSHA that such questions be

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OSHA had been contacted and had investigated, and had determined not to obtain a court injunction *before* the work refusal had occurred. The Complainants have never to this day filed anything with OSHA other than their complaint of discrimination. The Secretary is therefore not being completely candid in protesting that his regulation merely fills a gap in the statutory procedures to counter imminent dangers. He is really talking about protecting work refusals *per se*, and that is precisely what was rejected by Congress.

resolved via Section 13 procedures and not by holding out to employees the prospect of being paid for not working.

Congress' ultimate purpose in connection with "imminent dangers" not susceptible to timely correction through the statutory enforcement procedures was to create means—Sections 8(f) and 13—by which employees may get the Secretary into the situation quickly. If the Secretary would implement regulations to carry out his responsibilities under the Act, in accord with the Congressional intent and purpose vis-a-vis imminent dangers, he should promulgate regulations aimed at facilitating employee notification, and involving his officers in such situations quickly, rather than promulgating an employee job security regulation which has the effect of circumventing the Secretary's responsibilities altogether.[8]

In December, 1978, a Presidential Task Force issued a report titled "Making Prevention Pay—Final Report of the Interagency Task Force on Workplace Safety and Health" which critiqued the performance of OSHA. After finding little evidence that OSHA has had any impact in achieving the Congressional goal significantly to reduce workplace injuries (Report, pp. II-3/6, Tables II-1, II-2) the Task Force strongly recommended, *inter alia*, that OSHA stop fostering labor-management controversy and attempt to foster a consensus-oriented constituency in support of its program among labor, management and the general public (Report, pp. II-12, V-1/19, VIII-1/5) *and make more efficient use of its resources* (Report, II-7/14).

Significantly, the Secretary himself was Co-chairman of the Task Force (Report, p. iv).

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8. For example, he could promulgate regulations which would facilitate efficient communication between employees and his officers, *e.g.*, by creating a 24-hour "hot line" staffed by professional safety and health personnel authorized to make evaluation of "imminent danger" notifications, dispatch field personnel as necessary, and/or notify counsel to commence Section 13 proceedings—rather than regulating new rights to conduct protected work stoppages.

C. The Practical Effect of the Regulation Is to Defeat Congressional Intent.

The statute represents a balanced approach to the problem of correcting unsafe industrial conditions by fostering research and cooperative efforts among employees, employers and the government aimed at that end, within the framework of a detailed enforcement scheme which makes provision for imminent dangers. The regulation, however, merely encourages industrial discord by holding out to employees the prospect of being paid for refusing to work.[9] It potentially has the effect of discouraging corrective measures because it establishes bases for extensive federal court litigation over employee job security, disciplinary matters, and other disputes between employees and supervision wherein the contending parties' positions necessarily must be polarized on the issue whether hazards exist.

In addition, the litigation which this regulation encourages and has encouraged, while extensive, will never be fully conclusive. Results of such litigation will turn on questions of individual attitude, intent and perception at particular points in time. As this case shows, those questions are subject to variation in the dynamic context of working relationships. A determination that the Complainant's perception of danger was justified on July 10, 1974, for example, cannot say much about their perceptions the following day, or the actual hazards.

Since the ultimate objects of the litigation which this regulation encourages are resolution of disciplinary action, back pay

9. The Secretary's claim that the regulation does not set up a strike with pay situation is nonsense; the Secretary takes pains to qualify his position always with the point that an employer need not pay his work-stopping employee if alternate work which the employee is willing to perform is not available. Very little industrial relations sophistication is needed to see that the qualification will nearly always apply. Moreover, since the regulation is based upon employee perceptions of danger and adequacy of corrective measures rather than the facts of such matters (as this case so clearly demonstrates) the question is not susceptible of any certain or final resolution.

and job retention, rather than the safety-status of working conditions, the litigation will be counterproductive of Congress' purpose. Thus, even if a potentially hazardous condition in fact is susceptible to further correction, an employer worried about the back pay litigation may be tempted not to take further corrective measures out of fear that a court might, at the suggestion of the Secretary, misconstrue such action as representing agreement that the condition at the time of the work refusal was "imminently" hazardous.[10] Conversely, even if a condition is not in fact hazardous, an employer faced with a work refusal based on perceptions or claims of perception made by an employee may be encouraged to divert his attention and resources away from conditions which are in fact hazardous in order to avoid litigation.

These possibilities, which clearly are enhanced by this regulation, should be contrasted with the litigation setting contemplated by Sections 9, 10 and 13 of the Act, by which the attention of the parties and the decision makers is focused exclusively on the existence or non-existence of a hazard and/or corrective measures required.

The Secretary points out that Congress understood, or may be presumed to have understood, that employees have protected rights to strike over safety issues under other labor legislation (Resp. Brief, pp. 45-46). The inescapable conclusion to be drawn from this point, however, is that Congress intended to leave the exercise of such rights to be regulated by means provided by such other legislation; it did not intend that the Secretary would be using safety program resources to litigate in the federal courts over a plethora of industrial discipline disputes.[11]

10. Compare, *Diebold, Incorporated* v. *Marshall, Secretary of Labor et al.*, 585 F. 2d 1327 (6th Cir. 1978) wherein the Secretary urged the court to view an employer's safety-hazard research efforts as an "admission" that existing conditions were unsafe in violation of the Act. 585 F. 2d at pp. 1337-38.

11. Admittedly, Section 11(c) does block discipline or other discrimination which interferes with employee rights to exercise the

(Footnote continued on next page.)

D. The Secretary Misstates the Regulation's Impact Upon Employee Assistance in Enforcing the Act.

The Secretary asserts that the regulation is essential to implement his investigative and enforcement responsibilities; *i.e.*:

> "Because of the shortage of investigators and the unpredictability of imminent dangers, the Secretary must rely on information provided by employees." (Resp. Brief, p. 17.)

Accordingly, so the argument goes, work refusals must be protected under Section 11(c)(1) so that "channels of communication" between employees and OSHA will not be closed through "employer intimidation" (Resp. Brief, pp. 17-18.)

The argument is a *non sequitur*. The regulation in fact has the opposite effect upon employee participation in the statutory investigative and enforcement procedures. Section 8(f)(1) expressly states that employees must notify the Secretary whenever an imminent danger is believed to exist. This section provides clear statutory protection to the maintenance of open "channels of communication" between employees and the Secretary and assures that the antidiscrimination provisions of Section 11(c) will be available to any employee allegedly subjected to "employer intimidation." As demonstrated by this case, an employee is under no obligation whatsoever to attempt to contact the Secretary prior to engaging in a work refusal said to be protected by terms of the regulation; rather, there need only be:

> "[I]nsufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." 1977.12(b)(2).[12]

(Footnote continued from preceding page.)

statutory procedures. The regulation, however, goes far beyond that purpose by purporting to recognize a right to circumvent the statute and resort to self-help.

12. Note that the language of the regulation is essentially the same as that used by Congress in Section 13, wherein the District Courts are authorized to restrain conditions or practices

(Footnote continued on next page.)

Therefore, it is obvious that the regulation may well close the channels of communication which the Secretary seeks to preserve and thereby tear the heart from Section 8(f)(1) which establishes employee notification to the Secretary as the crucial first step in triggering imminent danger inspections. The Secretary would be well advised to improve the efficiency[13] of his enforcement staff instead of promulgating regulations which destroy the statute's enforcement procedures.

E. The Regulation Is Too Ambiguous to Be Accorded Any Weight in the Interpretation of the Statute.

The Secretary argues that his interpretation of the phrase, "any right afforded by the Act," should be followed because he is charged with execution of the Act and because his interpretation was made contemporaneously with passage of the Act.[14] The rule expressed by cases cited in support of this proposition[15] is not, however, unequivocal. This Court has held:

> "The familiar principle is invoked that great weight is attached to the construction consistently given to a statute

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(Footnote continued from preceding page.)

> "which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately, or before the imminance of such danger can be eliminated through enforcement procedures otherwise provided by this Act."
>
> 29 U. S. C. § 662(a).

The contrast and inconsistency between Congress' choice of means (court action) and the regulation (work stoppages) is obvious.

13. See footnote 8, *supra,* at p. 9.

14. The Secretary's claim that his interpretation was contemporaneous with passage of the Act stretches the term. His regulation was published in January, 1973, more than two years after enactment of the legislation.

15. The Secretary principally relies upon *Red Lion Broadcasting* v. *FCC,* 395 U. S. 367 (1969) to support his position that the Court ought to defer to his authority. In that case there had been 30 years of consistent administrative construction, followed by express Congressional ratification of that construction. Thus, the case is inapposite.

> by the executive department charged with its administration. . . . But the qualification of that principle is as well established as the principle itself. The court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons. . . . Moreover, *ambiguous regulations are of little value in resolving statutory ambiguities.* . . ."
>
> *Burnet* v. *Chicago Portrait Company*, 285 U. S. 1, at 16 (1932) (emphasis added; citations omitted)

The Secretary's regulation must be examined with that holding in mind.

The Secretary says first that a review of the Act and its legislative history reveals that it affords no right to walk off the job because of "potential unsafe conditions," or "if there is a dispute about the existence of a hazard," and that an employer "ordinarily" would be free to impose discipline for refusing to work because of "alleged" hazards. 29 CFR § 1977.12(a). In the next breath, however, the Secretary postulates circumstances which "might" give rise to protected work refusals. In describing such circumstances, the Secretary uses the terms "reasonable alternatives," "good faith," "real danger," "insufficient time" and "unable to obtain correction." 29 CFR § 1977.12(b).

For example, as has been noted, most employers certainly will correct, or attempt to correct, "imminent dangers" when notified of same. But there often will continue to be disagreement over the need for and nature and adequacy of the correction (as the record of this case amply demonstrates[16] and as is demonstrated by the many volumes of decisions issued by the Review Commission since its relatively recent creation).

16. See footnote 23, *infra*. As indicated there, the OSH Review Commission and its Judge issued four opinions over five years and ultimately disagreed with both Whirlpool and the Secretary on the question of alleged hazard and correction.

Correction of hazards, moreover, is just one of a number of such ambiguities upon which the Secretary's regulation hinges. The regulation, if upheld, thus will foster abundant federal court litigation as the contending parties seek to apply its multi-ambiguous terms to the infinite number of workplace situations extant within the Nation's complex industrial plant.

Examination of the "Purposes" section of the Act (29 U. S. C. § 651, quoted pp. 5-7, *supra*) discloses no basis whatsoever for assuming that it was Congress' purpose to foster extensive federal court litigation over the legitimacy of work stoppages in order to achieve its legislative goal. Indeed, as discussed in our principal brief, the legislative history demonstrates that Congress expressly considered and expressly rejected a clearly proposed legislative choice to include protected work stoppages as a means to correct unsafe conditions.

The regulation therefore should be given no weight by this Court in its interpretation of the Act, because:

a) the Act is unambiguous in light of legislative history, and thus requires no regulatory interpretation;

b) the regulation in any event is far more ambiguous than the Act itself; and

c) the very fact that the regulation is so ambiguous and will be the basis for unending disputes and litigation, runs diametrically counter to the Congressional purpose to achieve safety and health goals by fostering cooperation between employers, employees, and the government.

F. The Secretary's Reliance on Section 5(a)(1) of the Act Is Misplaced.

The Secretary's contention that Section 5(a)(1) of the Act (29 U. S. C. § 654(a)(1))[17] creates a right enforceable through

17. "Each employer—
(1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees;"

the antidiscrimination provisions is misleading and misplaced. It ignores the statutory scheme.

Congress provided employees with a right to call upon the Secretary to conduct inspections when reason exists to believe that a standard or provision of the Act is being violated in their workplace, or that an imminent danger exists, 29 U. S. C. § 567 (f). Congress further provided an enforcement scheme which (a) authorizes the Secretary to issue citations and proposed penalties for such violations as may be found, and (b) authorizes the Secretary to invoke the equitable powers of Federal District Courts in cases where he finds dangers to exist:

> "[W]hich could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."
>
> 29 U. S. C. § 662.

The "enforcement procedures otherwise provided by this Act" are set forth in Section 10 under the heading, "Procedure for Enforcement" 29 U. S. C. § 659, which provides for review and enforcement of citations by an independent adjudicative body, the Occupational Safety and Health Review Commission.

The employee's expressly stated statutory remedy for alleged violation of Section 5(a)(1) thus is to invoke the Secretary's investigatory and discretionary responsibilities by filing a complaint with him, and, in turn, participating in the enforcement procedure chosen by the Secretary (*i.e.*, Sections 9 and 10, or Section 13). As this Court held in *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U. S. 453 at p. 458 (1974):

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode,"

unless a contrary legislative intent is demonstrated. Here, of course, the legislative history shows clearly an intent not to protect work refusals as a mode of enforcing employer obligations. Moreover, the fact that Congress expressly protected employees from discrimination because of filing complaints, and expressly required the Secretary swiftly to act upon them, absolutely belies any intent to encourage employees to ignore the statutory procedures with the promise of pay for no work, or an intent to relieve the Secretary of his responsibilities in that manner, or to set up potential for conflict between decisions of courts ruling on controversies over the existence of Section 5 (a)(1) conditions in the context of discrimination lawsuits and decisions of the OSH Review Commission on the same issues.

Finally, the Secretary's view that the Section 11(c) term "any right" includes a protected right to withdraw from work assignments without regard to the usual employment consequences requires one to disregard the familiar principle of statutory construction known historically as *ejusdem generis,* which:

> "[C]ounsels courts to construe the act in light of the narrow, in common sense recognition that general and specific words, when present together, are associated with and take color from each other."
>
> *United States* v. *Insco,* 496 F. 2d 204, 206 (5th Cir. 1974)

Here, it is made plain by the legislative history and by the existence of express provisions for imminent dangers, that the Section 11(c) term in question, "any right," must be construed as reflective of the type of rights expressly referred to in Section 11(c)—*e.g.*, filing complaints, testifying, and assisting the Secretary in the conduct of inspections.

II.

THE SECRETARY MISCONSTRUES THE LEGISLATIVE HISTORY OF THE ACT IN ARGUING THAT CONGRESS DID NOT INTEND TO EXCLUDE WORK REFUSALS FROM EMPLOYEE RIGHTS PROTECTED BY THE ACT.

The Secretary emotionally contends that Congress "could not have desired to put employees to the choice" (Resp. Brief,

p. 50). The Secretary's characterization is misleading. Whirlpool never has suggested that Congress affirmatively decided to place any employees in peril. Congress did, however, affirmatively choose one legislative method (notice to Secretary, and injunctive action) and rejected others (strike with pay and/or administrative shutdowns) to deal with the matter of imminent dangers. The legislative history (Pet. Brief, pp. 21-36) establishes that both houses of Congress rejected entirely and categorically all proposals to protect work refusals.

Statements made by sponsors of the legislation clearly show a *conscious* intent to deal with imminent dangers via the Section 13 Imminent Danger provisions and not by protecting refusals to work:

> " 'Third, we have deleted a provision which was—though inaccurately—called a "strike with pay" provision and have provided that employees may request an inspection when they are subjected to dangers at the workplace.' . . . 116 Cong. Rec. 38707, Leg. Hist. at 1071. (Representative Daniels.)
>
> * * * * *
>
> " 'Let me emphasize again, there is nothing in our bill which authorized strikes without pay.' . . . 116 Cong. Rec. 38708, Leg. Hist. at 107[5]. (Representative Steiger.)
>
> * * * * *
>
> " 'The committee bill, while guarding against frivolous complaints, permits employees or their representatives to request inspections where they believe that a violation of a safety and health standard exists that threatens physical harm or that an imminent danger exists.' " 116 Cong. Rec. 37340-41, Leg. Hist. at 432. (Senator Williams.)

The Secretary ignores these clear and unambiguous statements made by the sponsors[18] of safety legislation in the Con-

18. As *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 584 at p. 564 (1976) and the opinions cited therein hold, sponsors' statements should be given substantial weight in assessing Congressional intent; this rule is especially applicable in determining

(Footnote continued on next page.)

gressional debate in arguing that Congress merely intended to "delete any requirement that employees who absent themselves from risk of harm be *paid* by their employers when doing so" (Resp. Brief, p. 58). Notwithstanding Respondent's protestations to the contrary, the legislative history is replete with evidence that Congress intended to require employees to "get the Secretary into the situation quickly" by requesting inspections pursuant to Section 13(d) in those instances "where they believe . . . that an imminent danger exists."

The Secretary's only answers to the legislative history rely on the fact that the rejected strike with pay proposition originated within a less than generally applicable context (Resp. Brief, pp. 19-20, 52-62), and would have introduced what even the Secretary describes as being a "novel proposition in federal labor legislation" (Resp. Brief, p. 19) which the Secretary is not implying by his regulation; he also notes that the rejected administrative shutdown proposals were directed at governmental rather than employee action (Resp. Brief, pp. 20, 62-70).

Those arguments fall short of the issue, however. The issue is whether or not Congress intended that imminent dangers be dealt with by means other than (a) the citation/penalty/abatement procedures set forth in Sections 9 and 10 of the Act, or (b) the imminent danger procedures set forth in Sections 8(f) and 13 of the Act. Congress' intent is absolutely clear. It rejected categorically all proposals which would effectively encourage work stoppages as means to deal with hazards. It rejected proposals offering even a limited work refusal protection to employees[19] as well as proposals which would have generated

(Footnote continued from preceding page.)

Congressional intent relative to the means by which the overall objective would be achieved, since it was the method, not the object, which produced controversy. Compare, *Wirtz* v. *Local 153, Glass Bottle Blowers' Ass'n.*, 389 U. S. 463 at p. 468 (1968).

19. The Secretary fails to explain how Congressional rejection of a limited right to quit work implies an intent or purpose to create a more extensive right as is reflected by the regulation.

any possibility of administrative shutdown orders sparked by undue employee or union influence upon the bureaucracy.

When one considers the course of this five-year old litigation over the issuance of a disciplinary warning and four hours' lost pay, and considers the probability that such litigation will proliferate if this ambiguous regulation is upheld, as well as Congress' rejection of strike with pay and administrative shutdowns as means to deal with imminent hazards, it should be clear that Congress did not intend that this Act would be used as a basis for adjusting labor-management disputes, other than as necessary to ensure the integrity of the enforcement processes and employee participation therein.

The Secretary's reliance upon the 1977 Amendments to the Federal Coal Mine Safety and Health Act, 30 U. S. C. 801 *et seq.* (Resp. Brief, p. 49) also is misplaced. The legislative history of the 1977 Amendments indicates that Congress intended that miners would continue to have rights provided under earlier legislation as construed by certain decisions of the District of Columbia Circuit Court of Appeals in *Munsey* v. *Morton*, 507 F. 2d 1202 (D. C. Cir. 1974) and *Phillips* v. *Dept. of Interior Board of Mine Operations Appeals*, 500 F. 2d 772 (D. C. Cir. 1974), *cert. denied*, 420 U. S. 938 (1975).

As the Fifth Circuit pointed out in rejecting the Secretary's position, *Marshall* v. *Daniel Construction Company*, 563 F. 2d 707, 715 (5th Cir. 1977), *cert. denied*, ... U. S. ....., 99 S. Ct. 216 (1978), the *Phillips* court held that the antidiscrimination provision in the earlier Coal Mine Safety and Health Act prohibited an employer from discharging an employee who had notified his foreman or authorized safety committeeman of possible safety violations in the employer's mine. The court held the employee's activity to be protected because it constituted the initial step in an internal review procedure agreed upon by the employer and the employee's union representative for processing employee safety complaints under the Coal Mine and Safety and Health Act. 500 F. 2d at 779-81.

Similarly, in *Munsey*, the Court held that:

> "The end and aim of Section 110(b)(1) [the antidiscrimination provision of the 1969 Mine Safety Act] was the protection of miners against retaliation by mine operators prompted by a miner's complaint to the Secretary. . . ."
>
> 507 F. 2d at 1202

The instant regulation is not, however, premised upon any effort to assure integrity of a complaint procedure. The sole basis for the Secretary's complaint here is that Messrs. Deemer and Cornwell allegedly were disciplined for refusing to work because they felt hazardous conditions existed,[20] not because they had contacted the Secretary.

The comments made at the time of the 1977 Amendments to the Coal Mine Safety and Health Act must be viewed in light of the particular problems facing the mining industry and the broad scope which Congress intended that legislation to have. The legislative history of OSHA, on the other hand, reveals that Congress expressly decided to reject this broad-based right to refuse work in favor of the statutory enforcement procedures whereby employees contact the Secretary.[21]

20. Moreover, the construction the Secretary would have the Court adopt in this case would go well beyond the court's holding in *Phillips*. It is important to note that the *Phillips* majority did not disagree with the dissent's remark that "the purpose of section 110 (b)(1) is to protect the integrity of the agency's investigative procedure by assuring that a miner who complained to the agency would not be penalized." 500 F. 2d at 786. Instead, the majority merely held that the employee was protected because he had made his complaint to the agency in the manner his union and the employer had agreed upon.

21. It is noteworthy that at the time of the 1977 Amendments to the Coal Mine Safety and Health Act several courts (including one court of appeals) had ruled that employees do not have the right to refuse work assignments under OSHA. *Marshall* v. *Daniel Construction Company*, 563 F. 2d 707 (5th Cir. 1977), *cert. denied*, ... U. S. ....., 99 S. Ct. 216 (1978); *Alders* v. *Kennecott Copper Corp.*, ... F. Supp. ....., No. 76-292-M (D. N. M. 1976); *Brennan* v. *Diamond International Corp.*, ... F. Supp. ....., 5

(Footnote continued on next page.)

III.

THE SECRETARY'S LEGAL ARGUMENTS ARE INCONSISTENT WITH HIS ACTIONS IN THIS CASE.

In response to Whirlpool's arguments that the regulation has potential for upsetting industrial procedures regulated by other laws, is inconsistent with the legislative history of the Act, and defeats the Congressional purpose, the Secretary argues that his regulation is "carefully circumscribed" to fill only a narrow procedural gap in the Act. Yet, the Secretary is arguing the validity of his regulation in the context of a case wherein the refused work assignment was identical to assignments which regularly had been carried out by the Complainants and numerous other employees for years; ample time and opportunity existed to invoke the statutory procedures as shown by the facts:[22]

1. The statute had been in effect for more than three years;
2. An OSHA inspector had conducted a thorough inspection of the plant work areas in February, 1974, in company with an employee walkaround representative who had frequently worked on the guardscreen;

(Footnote continued from preceding page.)
OSHC 1049 (BNA S. D. Ohio 1976); *Brennan* v. *Empire-Detroit Steel Division, Detroit Steel Corp.*, ... F. Supp. ....., No. C-1-74-345 (S. D. Ohio 1976), *rev'd sub nom., Marshall* v. *Whirlpool Corporation and Empire-Detroit Steel Division, Detroit Steel Corp.*, 593 F. 2d 715 (6th Cir. 1979); *Usery* v. *Whirlpool Corporation*, 416 F. Supp. 30 (N. D. Ohio 1976); *rev'd sub nom., Marshall* v. *Whirlpool Corporation and Empire-Detroit Steel Division, Detroit Steel Corp.*, 593 F. 2d 715 (6th Cir. 1979), *cert. granted*, 48 U. S. L. W. 3188 (1979). Congress' failure to comment adversely on these decisions indicates that it did not intend to extend this right to employees covered by OSHA.

22. See brief of Petitioner, pp. 6-7.

3. The screen was inspected by an OSHA inspector ten days prior to the work refusal, in connection with the accident investigation;[23]
4. The complaining witnesses had contacted OSHA a full day prior to their refusal (OSHA did not initiate any procedures to enjoin guard screen work).
5. Prior to the refusal, the guard screen areas had been inspected jointly by the Complainants and their supervisor;[24] the supervisor personally tested the screen by walking on it; and
6. At trial, both Complainants admitted they refused the job because they were "mad" and, upon reflection, were not actually opposed *per se* to performing the job.

Accordingly, and despite what the Secretary says about the intent behind his regulation, the facts make clear his intent to extend protections of the Act to any work refusal accompanied by a claim of safety hazard regardless of opportunity to invoke statutory procedures, and regardless of any contemporaneous action or inaction by the Secretary or the employer. It is, in short, an attempt to create a right wholly divorced from the statutory means adopted by Congress to implement its legislative objective.

---

23. That inspector told Whirlpool management that the accident resulted from a "mechanical malfunction" and not from any inherent screen deficiency. Admittedly, the OSHA Director later (after the work refusal) issued a citation critical of the screen and directing "immediate" correction. The OSH Review Commission upheld the citation five years later but found no evidence of a statutory violation in connection with the accident and extended the correction period from "immediate" to "six months after date of its order." This action by the forum entrusted with adjudicatory responsibilities under the Act patently belies any thought that the screen constituted any type of "imminent danger."

24. As stated in our principal brief, the screen was tested by independent engineers and was found fully capable of supporting weights far in excess of those which would have been applied by the Complainants.

CONCLUSION.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ROBERT E. MANN,
RONALD J. HEIN, JR.,
Attorneys for Petitioner,
Whirlpool Corporation.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON,
55 East Monroe Street, Suite 4200,
Chicago, Illinois 60603,
(312) 346-8000,
Of Counsel.

No. 78-1870

IN THE

Supreme Court of the United States

October Term, 1979

WHIRLPOOL CORPORATION,

Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INDUSTRIAL UNION DEPARTMENT, AFL-CIO, AND INTERNATIONAL UNION UAW AS AMICI CURIAE

J. ALBERT WOLL
General Counsel, AFL-CIO
815 15th Street, N.W.
Washington, D.C.

ELLIOTT BREDHOFF
General Counsel, IUD
1000 Connecticut Ave., N.W.
Washington, D.C.

JOHN FILLION
General Counsel, UAW
8000 E. Jefferson Avenue
Detroit, Michigan

GEORGE H. COHEN
ROBERT M. WEINBERG
1000 Connecticut Ave., N.W.
Washington, D.C.

LAURENCE GOLD
GEORGE KAUFMANN
MARSHA BERZON
815 16th Street, N.W.
Washington, D.C.

3 3 PRINTED IN USA

AUTHORITIES

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INDUSTRIAL UNION DEPARTMENT, AFL-CIO AND INTERNATIONAL UNION UAW FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the Industrial Union Department, AFL-CIO (IUD), and the International Union UAW respectfully move this Court, pursuant to Rule 42(1) of the Rules of this Court, for leave to file the accompanying brief as *amici curiae* in support of the position of the respondent in this case. The petitioner has refused its consent to the filing of said brief.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104

national and international labor organizations representing approximately 13,500,000 employees throughout the United States.

The Industrial Union Department, AFL-CIO (IUD) is a department of the AFL-CIO composed of 56 national and international unions representing approximately 6,000,000 employees in the industrial sector of the economy.

The International Union UAW which represents approximately 1,600,000 employees is the largest industrial union in this country.

This case concerns the extent to which the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, protects employees who face an imminent danger that threatens life or limb. The interest of working men and women and of their union representatives in the question presented is patent and the AFL-CIO, IUD and UAW therefore seek this opportunity to state their views on that question.

ISSUES TO BE COVERED IN THE BRIEF AMICI CURIAE

The attached brief *amici curiae* is devoted to three points each of which is stressed in the brief filed with the consent of the parties by the Chamber of Commerce of the United States as *amicus curiae*.

In part I of our brief we refute through the facts of the decided cases in point the Chamber's contention that "in reality employees are never faced with * * * a Hobson's choice between jobs and safety" (COC Br. 2-3.) Then in part II of our argument we show that § 13, OSHA, the Act's imminent danger provision, on its face belies the argument made by the Chamber and by Petitioner that "Congress

specifically rejected" (COC Br. 3) the premise that employees would ever be faced with that Hobson's choice. In the final section of our brief we demonstrate that contrary to the Chamber's contentions the Secretary's regulation is entirely consistent with the national labor policy and with the law as it has developed under the National Labor Relations Act.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
815 15th Street, N.W.
Washington, D.C.

Elliott Bredhoff
General Counsel, IUD
1000 Connecticut Ave., N.W.
Washington, D.C.

John Fillion
General Counsel, UAW
8000 E. Jefferson Avenue
Detroit, Michigan

George Cohen
Robert Weinberg
1000 Connecticut Ave., N.W.
Washington, D.C.

Laurence Gold
George Kaufmann
Marsha Berzon
815 16th Street, N.W.
Washington, D.C.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INDUSTRIAL UNION DEPARTMENT, AFL-CIO, AND INTERNATIONAL UNION UAW AS AMICI CURIAE

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

SUMMARY OF ARGUMENT

I. The Chamber of Commerce denies that the Secretary of Labor's regulation at issue "is necessary to eliminate the Hobson's choice between jobs and safety"; according to the Chamber, "in reality, employees are never faced with such a choice" (COC Br. 2, 3). The facts of the cases brought by the Secretary under the regulation belie the Chamber's soothing assurances: in each of the cases summarized one or more employees was directed to perform work which

placed them in immediate danger of death or serious injury and were discharged or otherwise disciplined for refusing to perform that work.

II. The Chamber errs also in asserting that "Congress specifically rejected" the premise that employees are faced with that Hobson's choice (COC Br. 3). The very Congressional debate on which the Chamber and Petitioner rely to contend that the Secretary's regulation violates the Congressional intent resulted in the adoption of § 13 of OSHA which provides that the Secretary of Labor may obtain an injunction when employees do *not* voluntarily abate imminent dangers. And § 13(c) provides that when a Labor Department safety inspector finds an imminent danger exists "he shall inform the affected *employees* and employers of the danger in that he is recommending to the Secretary that relief be sought" (emphasis added). The unmistakable purpose of this notice provision is to provide employers the opportunity to immediately take whatever action is necessary to end the danger; and failing such employer action to permit "affected employees," upon being advised of their peril to take whatever action is necessary to remove themselves from the danger.

The opponents of the Daniels bill which was reported out of the House Labor Committee objected to empowering a safety inspector to shut down a plant, and to enabling employees to "strike with pay." But it would be incongruous to suppose that Congress, having concluded the debate by providing for judicial proceedings and for notification by the inspector to the employees as well as to the employer, intended to "relegate the employees to * * * a procedure too slow to be effective." (Cf. *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S. 270, 286-287.)

In *Mastro Plastics* the Court refused to construe a provision of the National Labor Relations Act (NLRA) to reach "incongruous" results inconsistent with the NLRA's basic policy. That case provides an instructive analogy: if the inspector notifies employees that the "roof [is] about to collapse or a boiler about to explode," and the employer takes no steps to protect the employees, Congress could not have expected the affected employees to man their work stations and there await their fate or to be subject to discharge if they refuse to do so. This would be wholly antithetical to the policy of OSHA declared in § 2(b), and would require the employees to suffer because the employer has breached his basic duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; * * *." (§ 5(a)(1), OSHA.)

III. The Chamber of Commerce contends that the Secretary's regulation is inconsistent with the national labor policy as embodied in the NLRA. This claim rests on misunderstandings of the regulation and of the NLRA.

The regulation does not violate the national labor policy which encourages free collective bargaining. It simply effectuates the policy of OSHA which, like many other federal statutes establishes as a matter of public policy standards which provide a floor from which bargaining may proceed.

The Chamber's assertion that the regulation embodies a "subjective" standard is refuted by the language of the regulation itself, which establishes a "reasonable person" standard limited to urgent situations involving a real danger of death or serious injury. Thus, both in approach and in scope, the regulation is consistent with § 502 of the LMRA.

The Chamber also misstates the law under § 7 of the NLRA: *Labor Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 16 expressly rejected the proposition that the exercise of § 7 rights by employees is conditioned on their good faith. And while "a single employee's efforts to secure compliance with job safety laws" constitutes concerted activity under § 7 of the NLRA (COC Br. 33), the Secretary's regulation extends that right to workers who are not protected by the NLRA. And it is entirely consistent with Congress practice to provide concurrent federal remedies under the NLRA and other statutes. (See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36.)

The Secretary's regulation accords also with the practice of the parties in negotiating agreements and of arbitrators in deciding grievance disputes. The classic statement is that of the late Dean Shulman, the permanent umpire under the Ford Motor Co.—UAW agreement:

> The employee must normally obey [management's] order even though he thinks it improper. His remedy is prescribed in the grievance procedure. He may not take it on himself to disobey. To be sure one can conceive of improper orders which need not be obeyed. An employee is not expected to obey an order to do that which would be criminal or otherwise unlawful. He may refuse to obey an improper order which involves an unusual hazard or other serious sacrifice. [*Ford Motor Co.*, 3 L.A. 779, 780.]

ARGUMENT

I. *The Secretary's Regulation Provides Needed Protection to Employees Against the Hard Choice Between Loss of Their Jobs and Risk of Serious Injury or Death Arising from Imminent Danger Situations at the Workplace.*

The Chamber of Commerce declares it to be important to its members to dispute what it calls the "hyperbolic assessment" that the Secretary's "regulation is necessary to eliminate the Hobson's choice between jobs and safety." (COC Br. 2-3.)[1] And, while the Chamber contends that this proposition "is untrue because, in reality, employees are never faced with such a choice" (COC Br. 3), its opposition to the Secretary of Labor's regulation at issue is at least some evidence of its own recognition that there will be occasions in which employees are faced with the "Hobson's choice" which alone triggers the employees' right to refuse to work under that regulation. But, the best evidence of "reality" is provided by the facts of this and other cases in which the Secretary has actually applied the regulation.

We begin with the facts of the present case: In its statement of the case Petitioner describes in minute detail the guard screen on which the employees who were disciplined refused to walk, and observes that neither those individuals "nor any other employee had refused to walk on the screen prior to July 10, 1974." (Pet. Br. 5-7.) Only after more than two and a half pages of the statement does Whirlpool relate that:

> On June 28, 1974 an employee fell from a section of guard screen, and thereby sustained fatal injuries. [Pet. Br. 8.]

The Company it appears understood the significance of that death at the time. For Petitioner directed that no one walk on the guard screen and developed an alternative Vertalite procedure for cleaning the guard screen. The Com-

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[1] "COC Br." refers to the brief *amicus curiae* of the Chamber of Commerce; "Pet. Br." refers to the brief of the petitioner Whirlpool Corp.

pany does not state that this procedure was inadequate or otherwise explain why it was necessary—if it was—that in the face of this directive employees be again asked to walk on the screen. And the sequence of events shows that the death of their fellow-worker explains why two employees who had previously been willing to walk on the guard screen (notwithstanding other prior accidents) refused when, for the first time after that tragedy, they were ordered to do so. And it is the discipine of these individuals, rather than any perception that the work would be safe which best explains why there were no additional refusals to walk on the guard screen on July 10 or thereafter, an occurrence which petitioner would apparently treat as a tacit admission against interest by the employees. (Pet. Br. 7.) We are thankful that no additional deaths or serious injuries resulted, but it is more to the point that neither the two employees, nor the supervisor who directed them to walk on the guard screen, had any assurance that they would not meet such a fate. The District Court found:

> The defendant attempted to prove at trial that the complainants walked off their jobs not because they felt it was unsafe, but rather because they wanted an increase in pay for performing such work. The Court, however, is not willing to accept this contention and expressly finds that the employees refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm. This is supported by the fact that the foreman was not willing to allow them to use the Verta-lite procedure for cleaning the screen. Said procedure was an alternative to walking the screen developed after Mr. Cowgill's death. Furthermore, given that death, it is perfectly understandable that surviving employees would be reluctant to subject themselves to the possibility of a similar accident. The Court further finds that the threat of death or serious bodily harm was real and not something which existed only in the minds of the employees. While the defendant had begun to replace the original mesh panels of the screen with panels constructed of heavier gauge metal mesh having spiral wire connections, at the time in question only about one-third of the entire screen had been replaced. Certainly the fact that a man had fallen through the screen and been killed is the strongest possible evidence that it was unsafe and dangerous. Thus the Court finds that the job of cleaning the guard screen did present a danger of death or serious bodily harm. [Pet. App. 44-45.][2]

In *Marshall* v. *Daniel Construction Co. Inc.*, 563 F.2d 707 (C.A. 5) cert. denied 439 U.S. 880, Judge Wisdom described, in dissent, the facts alleged in the complaint:

> Daniel Construction Company employed Jimmy Simpson as an ironworker connecting structural steel in the construction of tall buildings. The job required fitting into place heavy steel beams with the aid of a crane. One windy day Simpson was working 150 feet above the ground. The wind grew so strong that it imperiled his life. He came down from high on the steel skeleton where he had been working. So did the rest of his crew. A foreman ordered the crew to return to work. Simpson refused. He was fired." [*Id.* at 717.][3]

In *Usery* v. *Babcock & Wilcox Co.*, 424 F.Supp. 753 (W.D. Mich.),

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[2] While petitioner challenges the District Court's findings at great length, that argument is entirely improper because it is not fairly encompassed in the question presented by the petition for certiorari, which was limited to the validity of the Secretary of Labor's regulation. (Pet. 2; contrast Pet. Br. 5). In any event, petitioner "could not in this case meet its heavy burden under the 'two-court rule.'" (*United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401, quoting *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.)

[3] The majority opinion did not describe the circumstances that caused the discharged employees' refusal to work.

> [S]ix pipefitters employed by the defendant were required to attach valves to the underside of a hopper assembling weighing many tons and they refused, claiming that the hopper was a suspended load and that it was dangerous to work under it." [*Id.* at 754, n. 1.]

In *Marshall* v. *Seaward Construction Company, Inc.*, 7 OSHA 1244 (D.C.N.H., March 28, 1979), the facts were these:

> In April of 1977 [the employer] was performing certain construction work on an interstate bridge over the Piscataquag River • • •
>
> On April 9, 1977, the defendant's superintendent, Anderson, instructed Purrington to proceed to the edge of the bridge to burn off some rivets in preparation for the welding of jacking pads. It was extremely windy, and Purrington refused to perform this work because he felt the high winds would place him in danger. He was immediately discharged, and requests were then made respectively of Schnurbush and McPhillip to perform the work, and upon their refusal, grounded also on the danger of working on the bridge in high winds, they were likewise discharged. Purrington discussed the incident with the engineer present on the job site who concurred with his assessment of the dangers involved. He then went immediately to the defendant's office in Kittery but, as it was a Saturday, this office was closed. Purrington then returned to his home and subsequently filed a complaint with OSHA. [*Id.* at 1245.]

Thus, having witnessed the discharge of their fellow employee Purrington for refusing to work on the bridge in the high winds, Schnurbush and McPhillip were squarely confronted with "the Hobson's choice between job and safety" which the Chamber of Commerce proclaims employees need never face. (COC Br. 2-3.)

The directions to the employees that they work under the conditions just described and the discharge and other discipline for refusals to do so may perhaps be explained on a premise other than "that employers operate in callous disregard for the safety of their employees" (COC Br. 3). For example, employers may have different perceptions of the risk involved than the employees whose lives are at hazard. And while it may be the policy of employers generally to value the safety of their employees above the immediate demands of production, the facts of the foregoing cases show, at the very least, that front-line supervisors sometimes have a different order of priorities, that they give on-the-spot orders to employees to perform life-risking labor, and that higher level management too often chooses to enforce the supervisor's decision rather than the more benign principles stated in the Chamber's brief.[4]

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[4] Another striking example is provided by the facts of a recent decision of the National Labor Relations Board, *Sargent Electric Company*, 237 NLRB No. 182, 99 LRRM 1165. The general foreman on a construction project discharged four employees for refusing to perform welding on the top of a silo under the following conditions:

> This work had to be done on a slippery working surface 20-25 feet in diameter, at a height of 94-100 feet above ground which immediately sets it apart from construction work performed on the ground, or while standing in a solid, conventional building that is under construction. The top of the silo was newly painted metal, made slippery by puddles of water, the forming of ice and the downfall of snow. The only protection that the line handlers had from being blown off the top by the predicted high winds or from slipping and falling off, was a waist high handrail. The conditions under which the welder had to work out of the boatswain's chair could scarcely be more dangerous. Greenwood's description of how he had to mount the boatswain's chair from the top of the handrail was

II. *The Statute Shows on Its Face That the Secretary's Regulation Protecting Employees Against Being Required To Choose Between Their Jobs and Safety in "Imminent Danger" Situations Effectuates Congress' Intent.*

We have seen that notwithstanding the Chamber's soothing assurances, the regulation in issue is necessary to protect employees from "the Hobson's choice between jobs and safety" (COC Br. 3). And the Chamber is likewise in error in stating that "Congress specifically rejected" the premise that employees would be faced with that choice. (COC Br. 3.) This is shown by the product of the very debate on which the Chamber and Whirlpool rely—§ 13 of OSHA, the provision that treats with situations in which employers do *not* voluntarily abate imminent dangers. Predictably there is

akin to a kamikaze pilot taking off. Sitting in the best of boatswain's chairs at heights of 94-100 feet to a low of 74-80 feet above ground, with high winds blowing him about, snow and ice descending upon him, trying to use a welding torch, or an acetylene torch, while adjusting his mask, is by any standard of objective evidence, proof that work was being done under abnormally dangerous conditions. [*Id.* at ALJ Dec. 8; footnote omitted.]

The temperature and wind conditions were as follows:

> The National Weather Services Surface Weather Observations at the Greater Pittsburgh Airport show that the temperature for Monday [December 10] ranged from 23° F at 1 a.m. to 30° F at 7:55 a.m. to 15° F at 11:58 a.m., to 9° F at 3:58 p.m. The same reports show a wind speed of 11, 13, 23 and 25 knots for the same time periods, with 1.9 inches of snow falling intermittently during this span of time. [*Id.* at 5, n. 7.]

In his testimony, General Foreman Huchestein "justified ordering the electricians up on the silo under the weather conditions of January 10 by stating 'We run a construction job, and it's not like home.' " (*Id.* at 6.)

not a suggestion in that debate that employers could, on the pain of discharge or discipline, require employees to work in the face of such abnormal dangers. Rather, that debate concerned the extent to which employees should have protections over and above the mere right to refuse to work in life-threatening work situations and shows that Congress contemplated that the Act would protect employees who exercise that right.

In both Houses, bills were introduced providing that an OSHA inspector who finds that an imminent danger situation exists would have the power immediately to issue an order prohibiting the employer from exposing employees to that danger.[5] In the House, the assignment of such power to individual OSHA inspectors became a subject of major controversy. Opponents of the provision voiced strong objection to permitting such low level bureaucrats to exercise a federal power that might encompass the shutting down of a significant portion of an employer's operation; they contended that instead the power should reside in the federal courts.[6] That was the limit of their concern with this provision. The opponents did not disagree with the basic proposition that employees should not be exposed to imminent life-threatening dangers. They stated that "the Government

[5] H.R. 16785 (hereinafter "the Daniels bill"), § 12, (Leg. Hist. 721, at 742-743); S. 2193, as reported (hereinafter "the Williams bill"), § 11, (Leg. Hist. 204, at 262-264). Both bills limited the length of time such an order could remain in effect, with the Daniels bill providing for a maximum of five days, § 12(a), (Leg. Hist. 742), and the Williams bill a maximum of seventy-two hours, § 11(b), (Leg. Hist. 264). Both bills also authorized the Secretary to seek appropriate injunctive relief in federal court to abate the danger. (Daniels bill, § 12(b), (Leg. Hist. 742-743); Williams bill, § 11(a), (Leg. Hist. 262-263).)

[6] Leg. Hist. at 884-885, 992.

should . . . have the power to abate a bona fide potential disaster."[7] And the opponents contended that "in case a roof was about to collapse or a boiler about to explode" employers would not expect employees to remain at their work stations.[8]

Thereafter, the House adopted a substitute bill that contained an imminent danger provision that met the objections that had been expressed by the opponents. That provision, which in all pertinent respects ultimately was enacted into law as § 13 of the Act, provided that the courts, rather than inspectors, would have the power to order an employer to shut down an operation or process posing an imminent danger to employees.[9] The imminent danger provision in the substitute bill necessarily created a delay from the time the inspector determines the presence of the hazard until an injunction has been applied for and the matter has been resolved by a court. Congress anticipated this additional time would be short.[10] Nevertheless, the substitute bill required that:

> as soon as an inspector concludes that conditions or practices [constituting an imminent danger] exist in any place of employment, he shall inform the affected *employees* and employers of the danger and that he is recommending to the Secretary that relief be sought.[11]

The unmistakable purpose of this notice provision is to pro-

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[7] Additional Minority Views of Representatives Scherle, Ashbrook, Eshleman, Collins, Landgrebe, and Ruth, (Leg. Hist. at 886).

[8] Leg. Hist. at 885.

[9] H.R. 19200, § 12, (Leg. Hist. 763, 796-797) (the "Steiger-Sikes Bill").

[10] Leg. Hist. 992.

[11] H.R. 19200, § 12(c), (Leg. Hist. 797 (emphasis added)).

vide employers the opportunity to immediately take whatever action is necessary to end the danger; and failing such employer action to permit "affected employees", upon being advised of their peril to take whatever action is necessary to remove themselves from the danger. Having specifically required the notification of employees, Congress must have intended this natural result. If the inspector notifies employees that the "roof [is] about to collapse or a boiler about to explode," and the employer takes no steps to protect the employees, Congress could not have expected the affected employees to man their work stations and there await their fate. And, of course, assuming the same facts, Congress must have also contemplated that employees confronting a life-threatening danger prior to the arrival of the government inspector at the workplace would also be able to protect themselves without being subject to discharge or discipline.

Congress "declare[d] it to be its purpose and policy *** to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources ***." (§ 2(b), OSHA.) And Congress made it the basic duty of every employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; ***." (§ 5(a)(1), OSHA.) The Act as a whole and the Secretary's regulation at issue in this case are in complete harmony with the Congressional intent expressed in these provisions.

Moreover, while the opponents of the Daniels bill objected to empowering federal inspectors to shut down operations, no one suggested that the employees' right to refuse to work

in the face of imminent danger to life or limb is subject to the same objections. And, the two situations are entirely different.

First, the objections of the opponents were based on their views as to the proper exercise of power by the federal government, and the constitutional restraints applicable thereto.[12] By their terms, these objections do not apply to the actions of employees.

Second, the opponents suggested that inspectors, who themselves have nothing at stake, might sometimes too readily issue shut-down orders. But an employee who exercises the right to refuse to work *loses pay* as a result. And, he is not protected by OSHA from the risk of discipline, including discharge, for insubordination unless he can establish after the fact that his action met the strict requirements of the Secretary's regulations.

On the other hand, it is not to be supposed that Congress, having concluded the debate by providing for judicial proceedings and for notification by the inspector to the *employees* as well as to the employer, intended to "relegate the employees to *** a procedure too slow to be effective." (Cf. *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 286-287.)

In *Mastro Plastics* the issue was whether § 8(d) of the NLRA, which expressly denies status as an "employee" to any individual who engages in a strike within the 60-day period prior to the termination of a collective agreement unless specified notices have been filed, is applicable to a strike within that period to protest the employer's unfair labor practices. This Court held, notwithstanding the literal

[12] See, e.g., Leg. Hist. 886, 425, 458.

language of § 8(d), that that provision does not apply under those circumstances. The Court was heavily influenced by the fact that an alternate "construction" would produce "incongruous results":

> The [petitioner employer] concedes that prior to the 60-day negotiating period, employees have a right to strike against unfair labor practices designed to oust the employees' bargaining representative, yet petitioners' interpretation of § 8(d) means that if the employees give the 60-day notice of their desire to modify the contract, they are penalized for exercising that right to strike. This would deprive them of their most effective weapon at a time when their need for it is obvious. Although the employees' request to modify the contract would demonstrate their need for the services of their freely chosen representative, petitioners' interpretation would have the incongruous effect of cutting off the employees' freedom to strike against unfair labor practices aimed at that representative. This would relegate the employees to filing charges under a procedure too slow to be effective. The result would unduly favor the employers and handicap the employees during negotiation periods contrary to the purpose of the Act. There also is inherent inequity in any interpretation that penalizes one party to a contract for conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer. [350 U.S. at 286-287.]

Here, too, the petitioner's construction "would relegate the employees to filing a [complaint] with the Secretary of Labor under a procedure too slow to be effective" to protect them from imminent danger to life or limb. As Judge Wisdom explained, dissenting in *Marshall* v. *Daniel Construction Co., Inc., supra:*

> Following his mandate to protect the American worker, the Secretary has filled a dangerous gap in the

Act. As the majority points out, the Act allows a worker to make a written request for immediate federal inspection whenever the workers believes himself to be in imminent danger. The Secretary must determine whether such an inspection is warranted. If he finds it is not, he must notify the complaining parties in writing. If he finds that it is, he must order an investigation as soon as practicable. The inspector then must determine whether imminent danger exists. If he finds that it does, he is required to inform the Secretary, who may bring an action in federal district court for an injunction. The employee may use a writ of mandamus, or its equivalent, to force the Secretary to act properly. While these events take place, the worker, presumably in imminent danger, has no relief according to the majority. In this case Jimmy Simpson would be required to stay on the high skeleton, handling heavy steel and attempting to balance himself, no matter how strong the winds became, or lose his job—until the district court issued an injunction. A literal reading of the statute in this situation may make its remedies tragically late. [563 F. 2d 707, at 718 (footnote omitted).]

Moreover, even as in *Mastro Plastics* the statutory construction which was rejected would have unduly favored employers over employees during negotiations for a new collective bargaining agreement (the situation dealt with by § 8(d)), so in this case petitioner's construction would strongly tip the balance against "preserv[ing] our human resources" (§ 2 of OSHA) by denying employees protection against discharge if they refuse to risk their lives by working. But above all, we submit that there is "inherent inequity" in any interpretation that enables one party (the employer) to penalize the other party (his employees) for refusing to risk their lives when it is the unlawful conduct of the employer—the failure to provide a safe working place

in accordance with § 5(a)(1)—which has created that risk. The equities favoring the employees are in fact much stronger here. And it is not, as it was in *Mastro Plastics,* a necessity here to override the literal language of the statute to reach the result which fairness manifestly requires.

III. *The Secretary's Regulation Is Entirely Consistent With the National Labor Policy of Which OSHA s a Part.*

(a) The Chamber of Commerce objects that the regulation in question "impos[es] through administrative fiat what parties are required to negotiate." (COC Br. 30.) The AFL-CIO, the IUD and the UAW yield to no one, and least of all to the Chamber of Commerce,[13] in their regard for the importance of "the practice and procedure of collective bargaining," which, under § 1(b) of the NLRA it is the policy of the United States to "encourage." But the Chamber's argument totally misconceives the relationship between OSHA, which the Secretary's regulation effectuates, and that policy.

It is true, of course, that safety and health matters, as "conditions of employment," are mandatory subjects of collective bargaining under § 8(d) of the NLRA since they are "plainly germane to the 'working environment.'" (*Ford Motor Co.* v. *NLRB,* 47 L.W. 4498, 4501 [May 14, 1979] quoting *Fibreboard Corp.* v. *Labor Board,* 379 U.S. 203, 222 [Stewart, J., concurring].)[14] To leap, however,

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[13] Compare, e.g., Brief for the Chamber of Commerce as amicus curiae in *Fibreboard Corp.* v. *Labor Board,* No. 14, Oct. Term, 1964.

[14] Cf. *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, 379:

> Certainly industrial strife may as easily result from unresolved

from this recognition to the assertion that the Secretary is precluded from promulgating the present regulation under OSHA because to do so would "remove those traditionally bargainable subjects from the collective bargaining table" (COC Br. 31) is to ignore the basic relationship between OSHA and the NLRA or, more fundamentally, between the growing array of federal laws "dictat[ing] as a matter of law" (COC Br. 31) certain minimal substantive standards of protection for employees, and the policy favoring collective bargaining embodied in the NLRA. For, as the Court recognized in *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296:

> Federal law * * * created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement for a system made in response to that duty, * * * and federal law sets some outside limits * * * on what their agreement may provide * * *.

OSHA is but one of the statutes setting those "limits" which also include, among others, the Fair Labor Standards Act,[15] Title VII of the Civil Rights Act,[16] Title III of the Consumer Credit Protection Act, which limits the right of employers to discharge employees because of garnish-

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> controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailed production and economic instability.

Gateway held that the national policy favoring arbitration for resolving disputes during the term of an agreement applies to health and safety disputes. Collective bargaining is, as Congress expressly declared in § 1(b) of the NLRA, the procedure for avoiding industrial strife and interruptions of commerce over unresolved labor disputes in the absence of an agreement.

[15] 29 U.S.C. § 201, *et seq.*

[16] 29 U.S.C. § 2000e, *et seq.*

ments,[17] and the Employee Retirement Income Security Act of 1974.[18] But these statutes do not, as the Chamber would have it, "remove these traditionally bargainable subjects from the collective bargaining table." (COC Br. 30.) Rather, they state minimum standards which must be respected, while permitting unions and employers to bargain over greater protections. Thus, for example, the point of *Alexander* v. *Gardner-Denver*, 415 U.S. 36, is that the statutory remedy provided in Title VII is not displaced by the fact that the complaining employee has a remedy under a collective agreement as well.

Indeed, so far as we are aware there is no case in this Court suggesting that there is a general principle that parties to collective bargaining may contract out of other federal laws. Of course, Congress can, expressly[19] or implicitly,[20] accommodate positive legislation to the terms of collective agreements. But there must be a predicate for accommodation in what Congress has said or done. And there is no evidence that Congress intended to effect such an accommodation of either OSHA in its entirety or the particular application of OSHA stated in the present regulation.

(b) The Chamber's further contention (COC Br. 33) that the Secretary's regulation invites conflict and inconsistency

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[17] 15 U.S.C. § 1674

[18] 29 U.S.C. § 1001, *et seq.*

[19] See, e.g., § 703(h) of the Civil Rights Act of 1964 which is part of the definition of discrimination under that Act. See also *Teamsters* v. *United States*, 431 U.S. 324, 348, 355; *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81-83.

[20] See *Connell Co.* v. *Plumbers and Steamfitters*, 421 U.S. 616, 621-623.

with the NLRA law as it has developed is based on a misunderstanding of both the regulation and the NLRA law.

1. The Secretary's regulation at issue in this case is designed to protect an employee who is "confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace." (29 C.F.R. 1977.12(b)(2).) The regulation is drawn narrowly to encompass only the most exigent of circumstances, and the standard is *objective*, not subjective:

> The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. [*Id.*]

In addition, the regulation requires that the employee must have "no reasonable alternative," must be acting in "good-faith," and "where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition." (*Id.*)

Thus, the charge that the Secretary's regulation requires "only a subjective good faith belief" that an imminent danger exists (COC Br. 35) and that the regulation suffers from "inherent subjectivity" (COC Br. 2) is totally unfounded.

The Chamber likewise errs in asserting that the regulation and the "strike with pay provision" which was rejected in Congress are "virtually identical" (COC Br. 23), since the regulation, unlike the defeated provision as explained by Mr. Daniels, does not provide for pay if the employer does not assign the employee to alternative work.[21] Indeed, by saying that the decision below "does, in fact, set up the potential for a 'strike with pay' which Congress expressly rejected" (COC Br. 24) the Chamber backhandedly acknowledges that the regulation does not now so provide.[22] For the same reason, Whirlpool's observations (Pet. Br. 19-20) which are reproduced in the margin[23] have nothing to do with this case.

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[21] The Daniels bill's "strike with pay" provision has nothing to do with the validity of the Secretary's regulation at issue in this case. The provision by its terms was not addressed to imminent danger situations. It was designed instead solely to deal with the problem of employee exposure over a period of time to "potentially toxic or harmful" substances. (Leg. Hist. 755-756.) Moreover, the controversy over the "strike with pay" provision concerned not whether employees had rights to leave their jobs but whether having left their jobs they had a right to "collect[ ] their paychecks for doing nothing." (593 F.2d at 731.)

[22] The language of the regulation at issue here, and 29 CFR § 1977.21 discussed at COC Br. 23-24 differ completely in this respect. Indeed, the precise terms of the Secretary's regulation governing "walkaround pay disputes" highlights that "pay" is the core provision:

> Employees should be able to freely exercise their statutory right to participate in walkarounds without fear of economic loss, such as the denial of pay for the time spent assisting OSHA compliance personnel during workplace inspections. Therefore, in order to insure the unimpeded flow of information to the Secretary's inspectors, as well as the unfettered statutory right of employees to participate in walkaround inspections, an employer's failure to pay employees for time during which they are engaged in walkaround inspections is discriminatory under section 11(c). [29 CFR § 1977.21.]

[23] "To afford individual employees absolute immunity—in terms of pay or discipline—from the effects of refusing a work assign-

2. The Chamber misstates the NLRA law in several respects:

First, the Chamber says that "As confirmed by this Court in *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962), section 7 protects strikes to protest unsafe working conditions *so long as there is good faith belief that such conditions exist.*" (COC Br. 33, emphasis added.) While the Chamber would perhaps prefer that the exercise of § 7 rights depend on the employees' good faith, § 7 does not so provide, and *Washington Aluminum* did not so hold. On the contrary, the Court there held that it was irrelevant that when the employees walked out, the employer "was already making every effort to repair the furnace and bring heat into the shop." (370 U.S. at 16.) The Court said "At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." (*Id.*) [24] In this respect the Secretary's regulation is narrower than the law under § 7 of the NLRA. Of course this does not mean that the regulation is superfluous, since its coverage is broader encompassing as it does individuals who are not "employees" under the NLRA, such as railroad and agricultural workers and supervisors.

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ment would reflect monumental change in prevailing labor policy." (Pet. Br. 19.)

"But neither of these two sections [§§ 7 and 502 of the NLRA] has ever been construed to create a right to refuse work without loss of pay." (Pet. Br. 20.)

[24] See also *id.* at n. 12 quoting *Labor Board* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333, 344:

> The wisdom or unwisdom of the men, their justifications or lack of it, in attributing to respondent an unreasonableness or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute.

Second, the Chamber states, correctly, that the NLRB has repeatedly held that "a single employee's efforts to secure compliance with job safety laws" constitutes concerted activity under § 7 of the National Labor Relations Act. (COC Br. 33 citing *Alleluia Cushion Co.*, 221 NLRB 999 (1975).) But this statement is not complete: the Board has applied § 7 also where an employee refused to perform assigned tasks on safety grounds. (See *Pink Moody, Inc.*, 237 NLRB No. 7, 98 LRRM 1463.) As the court below noted (593 F.2d at 726, n. 23), however, some courts of appeals have taken a narrow view of "concerted activity." But even if, as we believe, the Board's position, and the Court of Appeals decisions accepting that position, are sound, the regulation at issue here provides valuable protection to individuals who are not protected by § 7. And the existence of concurrent rights under the NLRA and other federal legislation is neither novel nor undesirable. That was the basis for the precise holding of *Alexander* v. *Gardner-Denver Co.*, *supra.*

Third, the Chamber claims that the Secretary's regulation sets a standard that protects employees covered by a no-strike clause who refuse to work on safety grounds in situations in which the "employees cannot satisfy *** the criteria" of § 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (COC Br. 35.)

In *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, this Court rejected the position that "an honest belief, no matter how unjustified *** necessarily invokes the protection of § 502." (*Id.* at 386.) As the only two Courts of Appeal which §have addressed the issue have held, the proper inquiry under § 502 as construed in *Gateway* is whether "[the employee's] belief that the [condition] was unsafe was amply

supported by 'ascertainable, objective evidence.'" (*Banyard* v. *NLRB*, 505 F.2d 342 (C.A.D.C.); see also *Plain Dealer Publishing Co.* v. *Cleveland Typo Union*, 520 F.2d 1220 (C.A. 6.)) Thus, under § 502, "what controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'" (*Redwing Carriers*, 130 NLRB 1242; see also *Combustion Engineers, Inc.*, 224 NLRB 542).

The Chamber's argument that the regulation is inconsistent with § 502 is based primarily on its erroneous insistence that the regulation is "subjective" and its further irrelevant argument that § 502 is narrower than the Secretary's regulation because "a job may be *inherently* dangerous, although not abnormally so under section 502, and therefore outside its protection" (COC Br. 35, emphasis added).[25] Section of 13 OSHA and the Secretary's regulation deal only with conditions that are "*imminently* dangerous." The OSHA rule at issue applies only if the employee has "no reasonable alternative"—that is, if there is "insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." It would appear that the "abnormally dangerous" standard of § 502 and the "no reasonable alternative *** due to urgency" standard of the regulation screen out the same cases: "urgency" is unlikely to be found in a situation which is not "abnormal."

A "no-strike pledge may be violated with impunity"

[25] The *Philadelphia Marine Terminals* case cited at COC Br. 35, n. 23, however, provides no support for that proposition.

(COC Br. 35) to the extent that § 502 applies, because as was recognized in *Gateway Coal*, that is the provision's *precise purpose*. And since, as just shown the Secretary's regulation does not deviate from § 502's standard the Chamber's conflict argument must fail for it depends on the proposition that the regulation protects employees whose work stoppage "does not meet the section 502 criteria" (COC Br. 35).

(c) Indeed, far from undermining the collective bargaining the NLRA is designed to encourage the Secretary's regulation accords with the actual practice of employers and unions in negotiating collective agreements, and the decisions of arbitrators interpreting such agreements. Some collective agreements expressly provide that while disputes over safety are to be resolved through the grievance procedure of the agreement, the grieving employee may refuse to perform allegedly unsafe work until the grievance is finally resolved. (See, e.g., the agreement quoted in *Hanna Mining Co.* v. *United Steelworkers of America*, 464 F.2d 565 at 566 (C.A. 8) and the discussion thereof, id. at 576-78.) And even absent such an express provision the leading statement of the generally applicable rule, and of the exception thereto, is that of the late Dean Shulman, who was the permanent umpire under the Ford Motor Company agreement:

> The employee must normally obey [management's] order even though he thinks it improper. His remedy is prescribed in the grievance procedure. He may not take it on himself to disobey. To be sure one can conceive of improper orders which need not be obeyed. An employee is not expected to obey an order to do that which would be criminal or otherwise unlawful. He may

> refuse to obey an improper order which involves an unusual hazard or other serious sacrifice. But in the absence of such justifying factors, he may not refuse to obey merely because the order violates some right of his under the contract. The remedy under the contract for violation of right lies in the grievance procedure and only in the grievance procedure. [*Ford Motor Co.*, 3 L.A. 779, 780.]

This exception has been applied time and time again by arbitrators and is now accepted as "a truism in the common law of the shop." (*Minnesota Mining and Mfg. Co.*, 59 L.A. 375, 378.) For example, in *Laclede Gas Co.*, 39 L.A. 833, 839, the arbitrator stated:

> The principle aplicable here is that an employee may refuse to carry out a particular work assignment, if at the time he is given the work assignment, he reasonably believes that by carrying out such work assignment he will endanger his safety or health. In such an instance the employee has the duty, not only of stating that he believes there is risk to his safety or health, and the reason for believing so, but he also has the burden, if called upon, of showing by appropriate evidence that he had a reasonable basis for his belief. In the case of dispute, as is the case here, the question to be decided is not whether he actually would have suffered injury but whether he had a reasonable basis for believing so. This is so well understood that the chairman does not believe that the general acceptance of this principle requires documentation.[26]

[26] Another arbitrator has characterized *Laclede Gas* as "a particularly apt expression of the principles involved *** synthesized from many other awards." *A. M. Castle & Co.*, 41 L.A. 667, 670. And in *A. M. Castle* the arbitrator elaborated a point inherent in the *Laclede Gas* analysis but not explicated there:

> So long as [the employee] is sincere in his belief of danger, and so long as he makes a "reasonable" appraisal of the potential hazards, he is protected in his decision not to act, regardless of whether later on, in fact, it would be established that no hazard existed. [41 L.A. at 671.]

It is in the same spirit that the District Court in *Gateway Coal*, whose action was approved by this Court (see 414 U.S. 387-388), and the Court of Appeals in *Hanna Mining Co., supra* (see 464 F.2. at 569-570) required the respective employers to abate the unsafe condition pending arbitration.

CONCLUSION

For the above stated reasons the decision below should be affirmed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
815 15th Street, N.W.
Washington, D.C.

Elliott Bredhoff
General Counsel, IUD
1000 Connecticut Ave., N.W.
Washington, D.C.

John Fillion
General Counsel, UAW
8000 E. Jefferson Avenue
Detroit, Michigan

George H. Cohen
Robert M. Weinberg
1000 Connecticut Ave., N.W.
Washington, D.C.

Laurence Gold
George Kaufmann
Marsha Berzon
815 16th Street, N.W.
Washington, D.C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78 - 1870

WHIRLPOOL CORPORATION, *Petitioner,*

v

RAY MARSHALL, SECRETARY OF LABOR, *Respondent.*

On Appeal From the United States Court of Appeals
For the Sixth Circuit

MOTION OF THE AMERICAN PUBLIC HEALTH ASSOCIATION FOR LEAVE TO FILE A BRIEF *Amicus Curiae* AND BRIEF *Amicus Curiae* IN SUPPORT OF RESPONDENT

Of Counsel:
CAROL OPPENHEIMER
Center for Law and Social Policy
1751 N Street, NW
Washington, DC 20036

ABIGAIL GINZBERG
1919 Park Road NW
Washington, DC

JEFFREY B. SCHWARTZ
Berriman and Schwartz
Suite 700
Valley Forge Plaza
King of Prussia, PA 19406
Attorney for Amicus

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1870

WHIRLPOOL CORPORATION, *Petitioner,*

v

RAY MARSHALL, SECRETARY OF LABOR, *Respondent.*

On Appeal From the United States Court of Appeals For the Sixth Circuit

MOTION OF THE AMERICAN PUBLIC HEALTH ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Supreme Court Rule 42(3), the American Public Health Association (APHA) respectfully moves for leave to file the accompanying brief in this case as *amicus curiae.* Respondent has consented to the filing of this brief; petitioner has not.

APHA, a non-profit corporation organized in 1872, maintains a large and diverse membership of 30,000 public health professionals, including top-level officials in state and local health departments, professors and administrators in schools of public health, and high-ranking officials in various federal agencies. The Association, which exists to promote and protect the public health, has devoted attention and resources

for many years to the occupational safety and health problems facing American workers. The decision in this case will have serious impact on the long term efforts of APHA members to reduce the incidence of death, injury, and disease caused by hazardous working conditions.

APHA is deeply concerned that workers receive the full protection accorded them under the Occupational Safety and Health Act of 1970 (OSH Act). Moreover, the APHA and its membership attach special importance to the outcome of this case as a test of the true strength of the Act's remedial and more specifically, preventive purposes. Because of the OSH Act's profound effect on the public health, *Amicus* urges the Court to reaffirm the broad remedial mandate of the law.

APHA submits the attached brief to insure the Court's full awareness of these issues, which it believes may not be adequately emphasized elsewhere.

APHA therefore moves for leave to file the accompanying brief as *amicus curiae.*

Respectfully submitted,

CAROL OPPENHEIMER
Center for Law and Social Policy
1751 N Street N.W.
Washington, DC 20036

JEFFREY B. SCHWARTZ
Berriman and Schwartz
Suite 700
Valley Forge Plaza
King of Prussia, PA 19406
Attorney for Amicus

ABIGAIL GINZBERG
1919 Park Road NW
Washington, DC

Of Counsel:

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RAY MARSHALL, SECRETARY OF LABOR, *Respondent.*

On Appeal From the United States Court of Appeals For the Sixth Circuit

BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the American Public Health Association (APHA).

APHA, a non-profit corporation organized in 1872, consists of over 30,000 members nationwide. The organization has a large and diverse membership, including directors and other top-level officials in state and local health departments, professors and administrators of schools of public health, and high-ranking officials in various federal agencies. Occupational safety and health has been a major area of interest and concern to the Association at least since 1914, when a membership section in this area was established.

The purpose of APHA and its members is to protect and promote public health. To that end, it is deeply concerned with

the safety and health of American workers. Occupational illness and injury had reached epidemic proportions at the time Congress enacted the OSH Act in 1970, and continues today at an excessive cost, in terms of both lost productivity and destruction to the quality of life for hundreds of thousands of workers.

With the elimination of infectious disease epidemics through public health sanitation and immunization methods, the workplace today remains the largest source of disease, death and disability preventable through change in living and working conditions.

The enormity of the problem posed by hazards in the workplace is graphically illustrated by the fact that every *month* approximately 2000 work-related amputations occur in this country.[1] Work-related accidents result in 13,000 deaths each year, and 2.3 million disabling injuries, of which 80,000 are permanently disabling.[2] Total work-related deaths each year number 100,000.[3] The annual cost of these occupationally-linked illnesses, injuries and deaths has been estimated at $20.3 billion.[4]

Public health problems of the magnitude and complexity of those in occupational safety and health require a broad

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[1]Memorandum from Dr. James Oppold, Director, Division of Safety Research, National Institute of Occupational Health (NIOSH), to Director, NIOSH, on OSHA compiled statistics (March 23, 1979).

[2]National Safety Council, *Accident Facts: 1979.*

[3]Testimony by Dr. Finklea, Director, NIOSH, before Subcommittee on Manpower and Housing, House Committee on Government Operations (May 11, 1976).

[4]The current cost of workers' compensation payments alone has been estimated at $7½ billion, a fourfold increase since 1960. *1978 Statistical Abstracts of the United States,* 355.

spectrum of responses from private and governmental sources. The Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("The Act" or the "OSH Act") represents perhaps the most comprehensive and significant attempt to address the problem. The Act establishes a framework within which employers employees and the government can work together to ensure a safe workplace for every American worker.

The OSH Act was intended by its framers to provide a safe and healthful environment to all workers through preventive measures. As the House Labor Committee stated: "Death and disability prevention is the primary intent of this bill." Leg. Hist. of the Occupational Safety and Health Act of 1970 at 853, quoted in *Brennan* v. *OSHRC (Underhill Const. Corp.),* 513 F.2d 1032, 1039 (2d Cir. 1975). Appellate courts have reiterated this preventive purpose. *Arkansas - Best Freight Systems, Inc.* v. *OSHRC* 529 F.2d 649, 653 (8th Cir. 1976) ("The Act is intended to prevent the first injury, including those of a more serious nature."); *Lee Way Motor Freight, Inc.* v. *Secretary of Labor,* 511 F.2d 864, 870 (10th Cir. 1975) ("One purpose of the Act is to prevent the first accident.")

APHA and its membership attach special importance to the outcome of this case because it tests the true strength of the remedial, and, more specifically, the preventive thrust of the Act. We urge this Court to reaffirm the remedial mandate of the law by recognizing the validity of the regulation at issue.

SUMMARY OF ARGUMENT

The issue before this Court turns on the validity of 29 CFR §1977.12(b) (2).[5] The central question is whether the Secretary

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[5]The regulation provides:

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative,

of Labor has acted within his authority by limiting the power of an employer to discipline an employee who, based on a reasonable and good faith belief, temporarily leaves his job to avoid a life-threatening situation. In our view, the regulation at issue effectuates the remedial purposes of the Act and represents a proper and necessary exercise of administrative discretion. As such, it should be upheld. To hold otherwise would impose on employees the cruel dilemma of choosing between their jobs and their lives.

At the outset, we submit that to understand the validity of CFR §1977.12(b) (2) requires a recognition that 1) the facts presented herein show that the workplace at issue was in serious violation of the entire spirit of the Act and 2) the regulation in question prescribes an appropriate remedy for this kind of violation.[6] First, the place of employment presented a recognized hazard, one of which the employer was already

[5]Continued from previous page....

> refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

[6]Indeed, the underlying facts of this case may well establish a violation of the letter of the law, as well as its spirit. The Act imposes on every employer the general duty

> to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

29 U.S.C. §654(a) (1).

acutely aware. In fact, prior to the events in this case, OSHA had already cited the company for a violation of the general duty clause. Furthermore, the company itself had recognized the seriousness of the danger: it had issued a general order instructing workers to keep off the guard screens. Finally, the hazard threatened not only the safety of workers but their lives: one worker had died in an accident caused by this hazard only twelve days earlier in the same plant.

A violation of this magnitude demands a remedy, whether explicitly contained in the Act or implied from the overall remedial thrust of the legislation. Indeed, courts have often implied remedies to protect the intended beneficiaries of a remedial statute and to effectuate the general purposes of the law. Where a statutory violation arises, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purposes." *J.I. Case Company* v. *Borak,* 377 U.S. 426, 433 (1964). *Cannon* v. *University of Chicago,* 99 S.Ct. 1946, 1961 (1979). ("...when [a] remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.") See also *Gomez* v. *Florida State Employment Service,* 417 F.2d 569 (5th Cir. 1969).

In the instant case, however, this Court need not address directly the "implied remedy" question. Rather, we are simply asking the Court to grant the Secretary of Labor the administrative latitude to which he is entitled under both the Act and established precepts of judicial review.

ARGUMENT

THE COURT SHOULD UPHOLD THE SECRETARY'S REGULATION AS A REASONABLE AND NECESSARY INTERPRETATION TO CARRY OUT THE REMEDIAL PURPOSES OF THE ACT

I. THE SECRETARY HAS WIDE DISCRETION TO PROMULGATE REGULATIONS UNDER THE STATUTE

The Act has bestowed on the Secretary of Labor broad powers to promulgate implementing regulations.[7] The courts, moreover, have deferred generally to agency expertise in reviewing agency exercise of its rulemaking powers. When focusing on statutes designed to protect public health and safety, courts have placed even greater confidence in the ability of the congressionally designated agency to promulgate regulations designed to carry out effectively the remedial mandate of the law. As one Appeals Court has stated:

> [I]n all matters regulated by a Congressionally authorized agency, judicial line-drawing in countless possible industrial and commercial situations should begin with deference to the expertise of the agency or administrator involved, especially in questions pertaining to the labor laws.

Brennan v. *Wilson Building, Inc.*, 478 F.2d 1090, 1098 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

When asked to consider the validity of OSHA regulations, courts have found the Secretary of Labor's interpretation of the

[7]The statute provides:

> The Secretary and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment. 29 U.S.C. §657 (g) (2).

Act to be "controlling even though there may be another interpretation which is equally reasonable." *Clarkson Const. Co.* v. *OSHRC*, 531 F.2d 451, 457 (10th Cir. 1976), *Accord, Builders Steel Co.* v. *Marshall*, 575 F.2d 663, 666 (8th Cir. 1978); *Intercounty Const. Co.* v. *OSHRC*, 522 F.2d 777, 779 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976). In short, judicial precedent makes it quite clear that courts should accord great weight to agency regulations.

II. THE REGULATION AT ISSUE, APPLICABLE TO LIMITED BUT VITAL CIRCUMSTANCES, IS NECESSARY TO ROUND OUT THE BROAD REMEDIAL PURPOSES OF THE ACT

The Act prescribes a broad and varied set of remedies to deal with safety and health violations when they occur. For most situations, the enforcement scheme expressly provided in the OSH Act is adequate to guarantee the rights of both employees and employers. For one narrow category of hazard, however, the Act offers absolutely no explicit remedy.

Thus, if one pictures the actual steps required to obtain from the Review Commission some form of relief, it becomes readily apparent that the procedural safeguards afforded employers render it an extremely time-consuming process.[8] In the instant case, for example, four years after the citation was issued, it was still in litigation. *Marshall* v. *Whirlpool Corp.*, 593 F.2d 715, 719, n.6.

Congress also adopted an imminent danger provision to deal with more immediate safety and health problems. 29

[8]After a citation is issued, an employer has 15 days to file a notice of contest. Twenty days after a notice of contest is received the Secretary must issue a complaint. The employer then has 15 days in which to file his answer. The Commission faces no time limit in which to schedule a hearing or issue a decision. This decision becomes final 30 days after it is issued. See, generally, 29 U.S.C. §559(c) and 29 CFR §2200 for details on these procedures.

U.S.C. §662(a). However, just as the administrative procedures are too lengthy, the imminent danger proceeding is wholly inadequate to cover such emergency situations as the high winds in *Daniel*[9] or the foreman's 11:00 p.m. order to return to the unsafe area in *Whirlpool*. The imminent danger proceeding requires at a minimum 1) that an inspection be conducted; 2) that a complaint be filed in federal court; and 3) that a hearing be held on the temporary restraining order. These procedures typically take several days, even if no delay occurs.

When one considers the realities of seeking judicial relief from the kind of emergency and life-threatening danger presented in this case, one reaches an inescapable conclusion: the protections afforded under the imminent danger provision clearly are not drawn to meet this situation. They create a serious, though small, gap in the OSHA enforcement scheme expressly provided by the Act.

Admittedly, the *Whirlpool*-type situation, characterized by both extreme urgency and the risk of serious harm, will arise very infrequently. Indeed, it has been estimated that 99% of all employers will voluntarily correct hazards brought to their attention.[10] Furthermore, for the remaining 1% of employers, many workers may be able to obtain adequate relief through normal OSHA enforcement procedures.[11] In a small number of cases, however, workers have no other recourse but to remove themselves temporarily from an extremely dangerous work situation.

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[9]Marshall v. Daniel Const. Co., Inc. 563 F.2d 707 (5th Cir. 1977).

[10]Subcomm. on Labor, Sen. Comm. on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970,* 452-453, 1009 (Comm. Print 1971).

[11]In 1977, OSHA received no more than 600 12 (b) (2) complaints. When one considers the size of the working population covered by OSHA, 62 million, this number borders on the infinitesimal. U.S. Dep't. of Labor, OSHA, FY 1977 Completed Cases Surveys, (March 24, 1978).

Even when a situation presents itself, very few workers will risk their jobs to avail themselves of §1977.12(b) (2) protection. Thus, the specter raised by the *Daniel* court that workers will abuse this right, causing disruption or termination of the employer's business, is unfounded for several reasons. 563 F.2d at 714. This regulation presents a very unattractive option because it provides workers with minimal protection in the face of employer retaliation. Thus, a worker who leaves his job because of an ultra-hazardous work situation faces termination. He must then file an 11(c) complaint and he later bears the burden of proving that the belief prompting him to leave his job was in fact reasonable. Finally, he may remain unemployed for a considerable time, pending a determination by both administrative and judicial agencies that his actions were legally justifiable.

The Secretary of Labor has properly exercised his discretion in promulgating this regulation. It is precisely because Congress could not possibly predict all conceivable enforcement problems that it entrusted the Secretary with rulemaking authority of this scope. We contend that the Secretary acted well within that authority in implementing 29 CFR §1977.12(b) (2). We further contend that the Secretary had little choice in carrying out his statutory responsibilities but to make explicit what the clear remedial purposes of the Act imply.

III. THE REGULATION, AT 29 C.F.R. §1977.12(b) (2), REPRESENTS A REASONABLE EXERCISE OF AGENCY DISCRETION

We have shown that it is in keeping with the spirit of the Act to grant an employee the limited right to leave his workplace when he reasonably perceives an immediate threat to his health or safety.[12] Industry appears to suggest, however,

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[12]Both the *Whirlpool* and *Daniel* courts have engaged in exhaustive discussion of the relevant legislative history, although they reached

that sustaining this regulation would create a veritable revolution in labor-management relations. This suggestion is a great exaggeration. In fact, the rights enunciated in the regulation at issue here already exist to some extent.

In resolving safety and health issues, arbitration decisions have generally recognized the right of an employee to refuse to obey a work order when he reasonably believes that such obedience would pose an immediate threat to his health or safety.

> The principle...is that an employee may refuse to carry out a particular work assignment if, at the time he is given the work assignment, he reasonably believes that by carrying out such work assignment he will endanger his safety or health. In such an instance the employee has the duty, not only of stating that he believes there is a risk to his safety or health, and the reason for believing so, but he also has the burden, if called upon, of showing by appropriate evidence that he had a reasonable basis for his belief. In the case of dispute, as is the case here, the question to be decided is not whether he actually would have suffered injury but whether he had a reasonable basis for believing so.

Laclede Gas Co., 39 LA 833, 839 (1962). See generally, *Elkouri & Elkouri, HOW ARBITRATION WORKS, ch. 16 (3d ed. 1973)*

Thus, arbitration decisions have generally incorporated these legal principles. Similarly, other federal labor laws extend

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[12]Continued from previous page....

differing conclusions. We contend, however, that the facts at issue here involve neither a "strike with pay" nor an "administrative shutdown;" and thus, the legislative history is not decisive on the issue before this Court.

a certain measure of protection to employees confronted with ultra-hazardous working conditions.[13]

We submit that the Secretary of Labor acted well within the bounds of his authority when he adopted the regulation at issue here. We further contend that any regulation that failed to provide a remedy for the kind of emergency situation presented in *Whirlpool* would be patently unreasonable, because it would contravene well established principles of labor law. This regulation correctly implements the remedial, and more particularly the preventive, spirit of the Act in a narrow, but vital, set of circumstances.

CONCLUSION

For all of the foregoing reasons, we urge this Court to sustain the regulation.

Respectfully submitted,

Jeffrey B. Schwartz, Esq.
Attorney for Amicus Curiae

[13]See, for example, *Gateway Coal Company* v. *United Mine Workers of America*, 414 U.S. 368 (1974); *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962).

We wish to acknowledge the assistance of Bernard Moss, a third year law student at U.C.L.A.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE; AND
BRIEF OF PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH AS *AMICUS CURIAE*

MICHAEL CHURCHILL
JEROME BALTER
JUDITH A. DORSEY
Attorneys for *Amicus Curiae*

Public Interest Law Center of Philadelphia
1315 Walnut St., Suite 1600
Philadelphia, Pennsylvania 19107
(215) 735-7200

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RAY MARSHALL, SECRETARY OF LABOR.

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for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH), by its Counsel the Public Interest Law Center of Philadelphia, respectfully moves for leave to file the

attached brief amicus curiae in this case in support of the position of the respondent. The consent of the attorney for the respondent Ray Marshall, Secretary of Labor, has been obtained. The consent of the attorney for the petitioner Whirlpool Corporation was requested but refused.

PHILAPOSH is a non-profit corporation dedicated to improving occupational safety and health conditions. More than 50 local unions in the greater Philadelphia area, representing approximately 50,000 workers, are official sponsors of PHILAPOSH. (See attached list.)

The Supreme Court's determination of the validity or invalidity of the Secretary's regulation, which affords employees a protected right to refuse imminently dangerous work, will affect the lives of all these employees served by PHILAPOSH.

PHILAPOSH's experience in occupational safety and health activities on behalf of employees has given it a

perspective different from that of the Secretary of Labor or of an employer such as Whirlpool Corporation. Therefore, PHILAPOSH's views should be heard by this Court, particularly in light of the important role employees are asked to undertake in the enforcement of the Occupational Safety and Health Act. The effectiveness of the workers' role in enforcement will be significantly determined by the scope of the protection afforded to them by the decision in this case.

For the foregoing reasons, PHILAPOSH requests this Court grant it leave to file a brief amicus curiae.

PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA

By /s/Michael Churchill
MICHAEL CHURCHILL

JEROME BALTER

JUDITH A. DORSEY

1315 Walnut St., Ste.1600
Philadelphia, PA 19107

Attorneys for Philadelphia Area Project on Occupational Safety and Health

Philadelphia Area Project on
Occupational Safety and Health

List of Trade Union Sponsors

Local No.	Company, Location	Union Members
United Steelworkers of America		
13939	Ionac Chemical, Birmingham, NJ	100
12238	Ionac Chemical, Birmingham, NJ	20
7207	Lenape Forge, Kennett Sq., PA	150
United Auto Workers		
918	Ford Motor, Pennsauken, NJ	200
1612	ITE-Gould, Phila., PA	2500
834	Kelsey-Hayes, Phila, PA	1000
1695	Ford Aerospace, Lansdale, PA	600
929	Ametek Schutte and Koerting Division, Cornwall Hts., PA	250
131	White Motors, Autocar Division, Exton, PA	400
2068	Trailmobile, W. Point, PA	600
1350	Leeds and Northrup, N.Wales, PA	100
Oil, Chemical and Atomic Workers International Union		
8-831	Mobil Oil, Paulsboro, NJ	1200
8-234	British Petroleum, Marcus Hook, PA	400
8-890	Tenneco, Burlington, NJ	200
8-743	Crown-Zellerbach New Castle, DE	150
8-667	Allied Chemical Phila., PA	200
8-760	3M Company Freehold, NJ	600
8-930	Sun Olin, Claymont, DE	100
8-638	Texaco, Westville, NJ	600
8-732	Amoco Chemicals, New Castle, DE	200
8-898	Getty Oil, Delaware City, DE	350
8-878	Kohnstamm Co., Camden, NJ	50
8-5570	Carter-Wallace Co., Cranbury, NJ	800
United Paper Workers		
375	Amalgamated Local, Phila., PA	1600
714	Scott Paper, Eddystone, PA	200
333	Amalgamated local, Phila., PA	600
68	Container Corp., Phila., PA	250

United Glass and Ceramic Workers

514	C § E Glass, Pennsauken, NJ	250
88	Rohm & Haas, Bristol, PA	600
482	Hooker Chemical, Burlington, NJ	300

International Union of Electrical Workers

111	Westinghouse, Phila., PA	100
140	Struthers-Dunn, Pitman, NJ	100

International Chemical Workers

619	Kawecki-Berylco, Boyertown, PA	250
959	Kawecki-Berylco, Boyertown, PA	40

United Rubber Workers

785	Lee Tire, Conshohocken, PA	600
367	Stauffer Chemical, Bordentown, NJ	125

United Electrical Workers

155	Amalgamated Local, Phila., PA	

Distributive Workers of America, District 65

95	Amalgamated Local, Vineland, NJ	800

National Union of Hospital and Health Care Employees

1199C	Amalgamated District, Phila., PA	8000

American Federation of State, County, and Municipal Employees

1723	Temple University, Phila., PA	200

United Textile Workers

2409	Nicolet, Ambler, PA	180

International Brotherhood of Electrical Workers

529	Electricians, Vineland, NJ	400

Service Employees International Union

668	State of Pennsylvania, Phila., PA	1200

Pennsylvania Federation of Telephone Workers

	Philadelphia Chapter, Bell Telephone, Phila., PA	4000

Chemical Workers Association, Independent

	DuPont, Salem, NJ	4500

Chemical and Industrial Workers Union, Independent

	DuPont, Gibbstown, NJ	200

Amalgamated Clothing and Textile Workers

	Philadelphia Joint Board	6000

Negro Trade Union Leadership Council 1000

Oil, Chemical, and Atomic Workers International Union 8-719
Exxon Chemical,
Pottsville, PA 200

Independent Union of Delaware Valley Chemical Workers
Hercules,
Gibbstown, NJ 80

Communications Workers of America Local 1084
Camden County Welfare Board,
Camden, NJ 250

American Federation of State, County and Municipal Employees Local 2187
City of Philadelphia,
Phila., PA 1200

USWA Local 2322
Phoenix Steel,
Phoenixville, PA 500

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INTEREST OF AMICUS

PHILAPOSH is a non-profit corporation dedicated to improving occupational safety and health conditions.

More than 50 local unions in the greater Philadelphia area, representing approximately 50,000 workers, are official sponsors of PHILAPOSH.

The Supreme Court's determination of the validity or invalidity of the Secretary's regulation, which affords employees a protected right to refuse imminently dangerous work, will vitally affect the lives of these employees. PHILAPOSH's experience in occupational safety and health activities strongly indicates that any diminution in the extent of employee protection provided under the Act will have a chilling effect on the ability of these workers to participate in the enforcement program designed by Congress.

QUESTION PRESENTED

WHETHER THE SECRETARY OF LABOR EXCEEDED HIS AUTHORITY IN PROMULGATING A REGULATION WHICH PROHIBITS EMPLOYERS FROM RETALIATING AGAINST EMPLOYEES FOR REFUSING TO WORK UNDER CONDITIONS WHICH THREATEN SERIOUS INJURY OR DEATH.

STATUTE AND REGULATION INVOLVED

Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §660(c)(1):

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act. (Emphasis added.)

29 C.F.R. §1977.12(b)(2)(1979):

> However, occasions might arise when an employee is confronted with a choice between not not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that

a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

STATEMENT OF THE CASE

This amicus curiae brief is limited to the issue of whether the Secretary of Labor exceeded his authority in promulgating a regulation prohibiting employers from retaliating against employees for refusing to work under conditions which threaten serious injury or death. For this reason, the brief relies on facts as found by the trial court in Usery v. Whirlpool Corp., 416 F.Supp. 30, 32 (N.D. Ohio 1976), and as affirmed sub nom. Marshall v. Whirlpool Corp., 593 F.2d 715, 719 (6th Cir. 1979):

1. On June 28, 1974, Mr. George Cowgill, a Whirlpool maintenance

employee, fell a distance of twenty feet through an overhead guard screen, where he had been assigned to work. Hours after this incident, Mr. Cowgill died as a result of the fall. Usery v. Whirlpool Corp., 416 F.Supp. at 32.

2. On July 10, 1974, Whirlpool assigned two maintenance employees, Mr. Deemer and Mr. Cornwell, to perform similar work on similar overhead guard screens. They refused to undertake the assignment stating that they believed the guard screens were unsafe. Id. at 32.

3. The trial court found that the work assignment which Mr. Deemer and Mr. Cornwell refused to undertake "did present a danger of death or serious bodily harm." Id. at 32.

4. In retaliation for their refusal to undertake the dangerous assignment, Whirlpool issued written reprimands to Mr. Deemer and Mr. Cornwell and sent them home, causing each of them to lose six hours of pay. Id. at 32.

SUMMARY OF ARGUMENT

The Occupational Safety and Health Act was adopted by Congress in order "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." To fulfill this goal, Congress developed an enforcement mechanism which requires the active cooperation of employees. In concert with previous remedial labor legislation dependent on employee involvement, Congress enacted an anti-retaliation provision which prohibits employers from retaliating against employees for exercising "any right afforded by this Act." 29 U.S.C. §660(c)(1).

Traditionally, courts have liberally construed anti-retaliation provisions so as to include within their penumbra rights explicitly provided and rights found to be implicit in the statutes. Though not expressly provided in the Act, the purpose of the Act and the effective enforcement of the employer's duty under §5(a)(1) to

provide a workplace free from hazards "causing or likely to cause death or serious physical harm," demand that a right to refuse imminently dangerous work be implied. In promulgating regulation 29 C.F.R. §1977.12(b)(2), the Secretary has authoritatively recognized such a right, and, in doing so, it cannot be said that he was unreasonable.

The legislative history with respect to the right to refuse imminently dangerous work is not definitive. The Congress never confronted the issue directly. That Congress rejected a proposal which would have provided a right to refuse some types of work with pay cannot be interpreted as meaning that Congress considered and rejected a provision, such as the Secretary's, which affords workers a right to refuse work without pay. Nor can Congressional rejection of proposals to authorize OSHA officials to halt, without judicial sanction, imminently dangerous work be interpreted

to mean that Congress opposed the right of individual workers to personally refrain from such activity.

The Secretary's regulation cannot be dismissed as unreasonable and accordingly must be upheld.

ARGUMENT

Preface

We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies still intact. We are talking about assuring our American workers who wok [sic] with deadly chemicals that when they have accumulated a few years seniority they will not have accumulated lung congestion and poisons in their bodies, or something that will strike them down before they reach retirement age. Legis. Hist. at 510 (Senator Yarborough).1/

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1. The legislative history of the Act is found in Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print, June 1971) (hereinafter "Legis. Hist.").

I. THE OCCUPATIONAL SAFETY AND HEALTH ACT IS REMEDIAL LEGISLATION REQUIRING EMPLOYEE COOPERATION FOR MEANINGFUL ENFORCEMENT.

A. Purpose of the Act

The Occupational Safety and Health Act of 1970 (hereinafter the "Act"), 29 U.S.C. §651 et seq., was intended by Congress to be remedial legislation. Congress declared that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses and disability compensation payments." 29 U.S.C. §651. The magnitude of the problem which the Act was designed to remedy was expressed by Senator Javits:

> The bill herewith is the most important piece of legislation affecting American workers to be considered by Congress in many years. Each year 14,000 Americans are killed at work, more than 2,000,000 suffer disabling injuries, and uncounted thousands fall victims to occupational diseases such as

> silicosis, asbestosis, bysinosis, pesticide and chemical poisoning, lung and bladder cancer, and other horrible byproducts of our industrial progress.

Legis. Hist. at 193.

To end this workplace carnage, Congress declared that its purpose and policy in the Act were "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. §651(b). This language is not mere hyperbole. "It is manifest throughout the [Act], that the purpose of the Act is to protect the health and safety of workers...." Brennan v. Occupational Safety and Health Review Commission, 488 F.2d 337, 338 (5th Cir. 1973). Section 5(a)(1), 29 U.S.C. §654(a)(1), commonly called the general duty clause, places on each employer the duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are

likely to cause death or serious physical harm to his employees." In §6(b)(5), 29 U.S.C. §655(b)(5), Congress directed the Secretary to set standards for toxic substances "which most adequately assure[s], to the extent feasible...that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard... for the period of his working life." (Emphasis added.) The overriding concern of OSHA, therefore, is the protection of the health of American workers. Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974).

B. Employee Role in Enforcement of the Act.

To effectuate its purpose, Congress generally encouraged employer-employee cooperation for workplace health and safety, 29 U.S.C. §§651(b)(1) and (4), but also proposed "separate but dependent responsibilities and rights" for employers and employees, 29 U.S.C. §651(b)(2). More

specifically, the Act seeks to encourage direct employee involvement in the enforcement of the Act and in the development of health and safety standards and regulations. Thus an employee is afforded the opportunity: to request an OSHA inspection of his workplace when he suspects a violation or when he suspects an imminently dangerous condition exists, 29 U.S.C. §657(f)(1); to have his representative participate in OSHA inspections of his workplace, 29 U.S.C. §657(e); to communicate with the OSHA inspector during the inspection of his workplace, 29 U.S.C. §657(f)(2); to be informed of any OSHA citations and proposed abatement schedules for correcting violations, 29 U.S.C. §658(b); to contest the proposed abatement schedule, 29 U.S.C. §659(c); to seek a mandamus order in a federal district court to require the Secretary of Labor to seek an injunction against his employer when imminently dangerous situations are found to be present in the workplace,

29 U.S.C. §662(d); to participate in the Act's rulemaking process, 29 U.S.C. §655(b)(2); to oppose his employer's requests for variances from applicable rules, 29 U.S.C. §§655(b)(6) and (d); and to challenge promulgated standards, 29 U.S.C. §655(f).

By providing employees with these enforcement rights, Congress gave clear evidence that it intended workers to have a dynamic role in the continuous process of securing and maintaining safe and healthful workplaces. The enforcement rights further indicate Congressional recognition of the realities of employer-employee relations; i.e., that an employer is much more likely to conform to governmental health and safety standards if his employees are endowed with meaningful oversight powers.

Congress also recognized that Occupational Safety and Health Administration (hereinafter "OSHA") inspectors alone cannot adequately police the millions of workplaces covered by the

Act. See Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 483-4 (D.C. Cir. 1974). Congressional hearings in 1970 revealed that "both Federal and State safety and health inspectors [were] severely inadequate in number." Legis. Hist. at 1032 (Congressman Dent). Congressman Dent's observations are still applicable. In fiscal 1976, there were over four million private sector workplaces employing over sixty million workers covered by the Act.2/ There were some 58,000 worksite inspections by OSHA, and states with approved plans made

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2. "1976 County Business Patterns," Department of Commerce, Bureau of Census, CBP 76-1 (August, 1978)

an additional 140,000 inspections.3/ These statistics reveal that, on the average, each workplace in the nation can expect a government safety and health inspection once every twenty years. It is apparent, therefore, that if employees are to have workplaces free from hazards causing or likely to cause death or serious physical injury, their active participation in the OSHA enforcement scheme is essential.

C. The Act's Anti-Retaliation Provision

The anti-retaliation provision of the Act, 11(c)(1), 29 U.S.C. §660(c)(1), reads as follows:

> No person shall discharge or in any manner discriminate against

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3. Report to the Congress of the United States, "How Can Workplace Injuries Be Prevented? The Answers May Be In OSHA Files", U.S. General Accounting Office, HRD-79-43 at 2 (May 3, 1979).

> any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act. (Emphasis added.)

Provisions similar to §11(c)(1) have traditionally been included in remedial labor legislation.4/ Commenting on the necessity for a similar provision in the Fair Labor Standards Act

4. Such provisions appear in the National Labor Relations Act, 29 U.S.C. §158 (a)(4); the Fair Labor Standards Act, 29 U.S.C. §215(a)(3); the Federal Mine Safety and Health Act; 30 U.S.C. §815(c)(1); Title VII of the Civil Rights Act, 42 U.S.C. §2000e-3; and the Longshoremen's and Harbors Workers' Act, 33 U.S.C. §948(a).

(hereinafter "FLSA"), 29 U.S.C. §215(a)(3),5/ Mr. Justice Harlan observed:

> "[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

Worker protection clauses, such as §11(c)(1), have traditionally been construed in accordance with the rule

5. F.L.S.A., 29 U.S.C. §215(3)(a):

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--
>
> * * * *
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or has or is about to serve on an industry committee.

that statutes intended to protect workers should be given a liberal construction. Lilly v. Grand Trunk Western R. Co., 317 U.S. 481, 486 (1943); NLRB v. Scrivener, 405 U.S. 117, 124 (1972). Moreover, such provisions "must be read in the light of the mischief to be corrected and the end to be attained."(Citations omitted). Dunlop v. Carriage Carpet Co., 548 F.2d 139, 145 (6th Cir. 1977).

Illustrative of these principles is the construction given to the anti-retaliation provision of the Coal Mine

Health and Safety Act 6/ with respect to the discharge of a miner for refusing to work under hazardous conditions in the case of Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), cert. denied sub nom. Kentucky Carbon Corp.

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6. The anti-retaliation provision of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. §820(b)(1):

(b)(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

v. Interior Board of Miner Operations Appeals, 400 U.S. 938 (1975). The statute, which was the forerunner of the Occupational Safety and Health Act, had no express provision affording miners the right to refuse work under hazardous conditions and no regulation to that effect had been promulgated. Nevertheless, the court interpreted the work refusal to be the first step in a process of filing a safety complaint with the employer under an employer-employee agreement; the complaint to the employer was also a step in the process of making a complaint to the Mine Safety Board which administered the Act, and therefore the discharge was ruled to be a discharge for the worker's attempt to file a complaint with the Mine Safety Board. Accordingly, the court held that the employer had violated the statute's anti-retaliation provision. See also Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974), aff'd sub nom. Munsey v. Federal Mine

Safety & Health Review Commission, 595 F.2d 735 (1978). In commenting on Phillips, the Sixth Circuit in the case below remarked that even in the absence of an employer-employee agreement "[t]here is no reason to accord lesser protection to employees of companies without such formal procedures." Marshall v. Whirlpool Corp., 593 F.2d 715, 725 n. 18 (1979).

In 1977, when Congress amended the Coal Mine Health and Safety Act, it also amended the anti-retaliation

provision, 30 U.S.C. §815(c)(1),7/ and

7. The amended anti-retaliation provision, appearing in the Federal Mine Safety and Health Act, 30 U.S.C. §815 (c)(1):

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential

(footnote cont.)

the accompanying Senate Report explicitly endorsed the Phillips and Munsey decisions. Sen. Rep. 95-181, 95th Cong., 1st Sess. (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 3401. More specifically, the Senate Report endorsed the right of miners to refuse hazardous work.

> This section is intended to give miners, their representatives, and applicants, the right to refuse work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

Id. at 3436.

(footnote cont.)

> transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or, has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

The liberal construction which the Phillips court gave to the anti-retaliation provision in the Coal Mine Health and Safety Act is clearly in the tradition of previous court interpretations of such provisions. Fifteen years earlier, the Supreme Court was called upon to construe the anti-retaliation provision of FLSA in Mitchell v. Robert DeMario Jewelry,Inc.,361 U.S. 288 (1960). That anti-retaliation provision, 29 U.S.C. §215(a)(3),8/ prohibited employers from retaliating against employees for instituting complaints regarding substandard wages, but the statute did not expressly provide for employers to reimburse employees for wages lost due to the unlawful employer retaliation. Recognizing that few workers would avail themselves of the statutory right to complain about substandard wages if by such action they ran the risk of losing all their wages, this Court found an implied right in the FLSA which entitled

8. See footnote 5, supra.

employees to be reimbursed. Said the Court: "[W]e cannot read the [FLSA] as presenting those it sought to protect with what is little more than a Hobson's choice." Id. at 293.

Recently, in Chamber of Commerce v. OSHA, 465 F.Supp. 10 (D.D.C. 1978), appeal docketed, No. 79-2302 (D.C. Cir. October 29, 1979), the district court was required to construe the employee protection provision of the Occupational Safety and Health Act, §11(c)(1), 29 U.S.C. §660(c)(1), in relation to the so-called walkaround provision of the Act, §8(e), 29 U.S.C. §657(e).9/ The

9. Section 8(e), 29 U.S.C. §657(e):

> (e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or

(footnote continued)

walkaround provision affords employees a right to have a representative participate in OSHA workplace inspections. The provision and the statute, however, are silent regarding the responsibility of employers to compensate the representative (employee) for time spent on the walkaround. In 1973, the Secretary had issued a regulation declaring that it was "not per se discriminatory" for an employer to refuse to pay for walkaround

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(footnote cont.)

his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

time. 29 C.F.R. §1977.21 (1973).10/ In 1977, however, the Secretary issued a revised regulation which makes the withholding of pay for walkaround time a violation of §11(c)(1). 29 C.F.R. 1977.21

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10. The regulation on walkaround pay as promulgated in 1973, 29 CFR §1977.21(1973), in relevant part reads as follows:

> (a) Complaints involving claims of discrimination based upon employer failure to pay employees who participate in section 8(e) federal walkaround inspections of a workplace will require close scrutiny of the facts in each instance. However, as a general rule, such refusal to compensate for time so spent is not per se discriminatory....

Leone v. Mobil Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975), held that neither F.L.S.A., 29 U.S.C. §201 et seq., nor the Occupational Safety and Health Act required employers to compensate employees for walkaround time.

(1979). 11/ In issuing the revised

11. The regulation on walkaround pay as revised in 1977, 29 C.F.R.§1977.21 (1979), reads as follows:

§1977.21 Walkaround pay disputes.

The Secretary recognizes the essential nature of employee participation in walkaround inspections under section 8(e) of the Act. Employees constitute a vital source of information to representatives of the Secretary concerning the presence of workplace hazards. Employees should be able to freely exercise their statutory right to participate in walkarounds without fear of economic loss, such as the denial of pay for the time spent assisting OSHA compliance personnel during workplace inspections. Therefore, in order to insure the unimpeded flow of information to the Secretary's inspectors, as well as the unfettered statutory right of employees to participate in walkaround inspections, an employer's failure to pay employees for time during which they are engaged in

(footnote continued)

regulation, the Secretary noted that experience in administering the OSHA program had shown that "employee participation and cooperation at the inspection stage [had] proved to be critically important to enforcement efforts under the Act," 42 Fed. Reg. 47344(1977), and that "loss of pay involved [in a walkaround] would clearly constitute a disincentive to employees exercising their express statutory right under §8(e) to accompany a compliance officer during an inspection." Id., 47344-45. Based on this experience, the court held that the revised regulation was valid. Said the court:

(footnote cont.)

walkaround inspections, is discriminatory under section 11(c). In addition, where employees participate in other inspection related activities, such as responding to questions of compliance officers, or participating in the opening and closing conferences, an employer's failure to pay employees for time engaged in these activities is discriminatory under section 11(c).

> The Secretary's ruling is in no way inconsistent with the Occupational Safety and Health Act or any other expression of Congressional policy. To the contrary, requiring walkaround pay is plainly adapted to the effectuation of employee participation rights afforded by section 657(e). (Footnotes omitted.)

Chamber of Commerce, 465 F.Supp. at 13.

In so holding, the district court was following the rule of applying liberal construction to remedial statutes; and more particularly it was following the precedent established in Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

Section 11(c)(1) is broadly drawn; it expressly protects employees in the exercise of "any right afforded by the Act." It indicates a Congressional intent to provide employees with comprehensive protection in order to encourage their cooperation with the Act's enforcement program. See Chamber of Commerce, supra. Nevertheless, Whirlpool would have this Court construe §11(c)(1) so narrowly that a right which is implicit in the Act would remain

unprotected. Petitioner's Brief (hereinafter "Pet. Br."), 18, 19, 34. To construe remedial legislation so narrowly would represent a sharp departure from judicial tradition. To construe §11(c)(1) so narrowly would deny employees a protected right to refuse imminently dangerous work. To construe §11(c)(1) so narrowly would mean that while employees covered by the Coal Mine Safety and Health Act have a protected right to refuse imminently dangerous work, the employees covered by the Occupational Safety and Health Act would have "what is little more than a Hobson's choice." Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 293 (1960).

II. THE SECRETARY'S REGULATION IS REASONABLY RELATED TO THE ACT

Preventing tragedies such as befell George Cowgill at Whirlpool and as befell thousands of workers each year, rather than payment of death benefits and workers' compensation, is the raison d'etre of the Act. Given that legislative purpose, Cowgill should have had a

protected right to refuse to continue his work assignment and to remove himself to safer quarters before the tragedy occurred. Without such a protected right, many workers under economic pressure will continue to work at imminently dangerous tasks, and many more tragedies, inevitably, will result. Nonetheless, the petitioner contends, in effect, that if Cowgill had removed himself from the unsafe overhead guard screens before the tragedy, the Whirlpool Corporation would have been within its legal rights to retaliate against him for his life-preserving conduct by firing him or by any other economic sanction. It is impossible to believe that in adopting the Occupational Safety and Health Act, Congress consciously intended to create such an anomaly.

The Secretary, fortunately, has rejected this draconian view, and he has reasonably construed the Act to provide employees with an implied right to refuse work under certain conditions. Those conditions are delineated in

regulation 29 C.F.R. §1977.12(b)(2) (1979), promulgated in 1973, which provides:

> However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or a serious injury, and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

The regulation is carefully drawn and considerably circumscribed. Under

the regulation, the right to refuse work arises only if:

(1) the employee seeks corrective action from his employer, where possible; and,

(2) the employer fails to make the correction; and,

(3) there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to OSHA's regular enforcement machinery; and,

(4) there is a real danger of death or serious injury as judged under the objective, reasonable man test; and,

(5) the employee's refusal to continue his work assignment is made in good faith.

Under the regulation, the right to refuse work is limited to situations where there is a "real danger of death or serious injury." In establishing this criterion, the Secretary has tracked the statutory language of §5(a)(1), which imposes a duty on an employer to provide "employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm

to his employees." 29 U.S.C. §654(a)(1). The regulation also tracks the language of §17(k), which differentiates serious health and safety violations from non-serious ones: "A serious violation shall be deemed to exist... if there is a substantial probability that death or serious physical harm could result from a condition which exists." 29 U.S.C. §666(j). Thus, the regulation affords employees a right to refuse work only in situations where there is a serious violation and the employer is in violation of his duty under the Act. Though these are necessary conditions, they are not sufficient to establish the right to refuse work. The right arises only after all the other conditions are fulfilled. In effect, the right arises only in situations where no one else can or no one else will protect the employees health, safety or life.

Considering the many "legal" conditions which must be satisfied before the right to refuse work arises, a worker is not very likely to cease working in reliance on the regulation's

protection except in the most serious situations. Even then, unfortunately, he may find that when his action in the face of impending tragedy is evaluated months or years later, an administrative or judicial panel may find that it does not measure up to the legal requirements of the regulation. See Usery v. Alan Wood Steel Co., 40 OSHC 1598 (BNA, E.D. Pa. 1976). Even so, the limited right to refuse work afforded by the regulation is better than no right at all.

Contrary to the assertions of Whirlpool (Pet. Br. at 18), the regulation does not require an employer to compensate an employee during the period when he is exercising his right to refuse work if no alternative work is available or if he refuses to perform that alternative work. Conversely, the regulation prohibits the employer from discriminating against the worker, and, consequently, the employer violates

§11(c)(1) if he refuses to offer the employee alternative work if such work is available. Consequently, Whirlpool unlawfully retaliated against employees Deemer and Cornwell when it refused to offer them available alternative work and thereby caused them to lose wage income for exercising their right to refuse imminently dangerous work.

Further, contrary to the contention of Whirlpool (Pet. Br. at 35), the regulation does not provide employees with a right to "shut down" an employer's operations. The regulation merely gives employees the right to personally refuse certain work; the employer may continue the operation with other employees if they are willing to undertake the hazardous assignment.

The statutory purpose of the Act leaves no doubt that unless workers have a right to refuse imminently dangerous work, the Act's remedial purpose would be severely frustrated. The Secretary has construed the Act to imply a right to refuse work under the limited

conditions of the regulation. The Secretary's determination is reasonably related to the purposes of the Act and therefore is entitled to great weight. Mourning v. Family Publications Services, Inc., 411 U.S. 356, 369 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 433-4 (1971). In order to sustain the regulation, the Court "need not find that its construction is the only reasonable one, or even that it is the result [the Court] would have reached had the question arisen in the first instance in judicial proceedings." (Citations omitted.) Udall v. Tallman, 380 U.S. 1, 16 (1965); see also Brennan v. Southern Contractors Service, 492 F.2d 498, 501 (5th Cir. 1974).

III. THE SECRETARY'S REGULATION IS NOT INCONSISTENT WITH THE INTENT OF CONGRESS AS REFLECTED IN THE LEGISLATIVE HISTORY

A. Ambiguity of the Legislative History

The purpose and structure of the Act logically demand that the right to refuse imminently dangerous work be

implied. Recognizing that the Act contains no express exclusion of such a right (Pet. Br. at 17), Whirlpool bases its refutation of the regulation on the Act's legislative history. (Pet. Br., 21 et seq.). Numerous courts have examined this history, and they are sharply divided.

In Marshall v. Daniel Construction Co., Inc., 563 F.2d 707 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978), a divided court held that the legislative history indicated that Congress did intend to deny workers the right to refuse work; but in dissent, Judge Wisdom concluded that, "Congress felt that workers could live with the prescribed processes of this Act. I cannot believe that it required workers to die for them." Id. at 722.

The majority view in Daniel is supported by the Tenth Circuit in Marshall v. Certified Welding Corp., 7 OSHC 1069 (BNA, 10th Cir. 1978). More recently, in the case below, Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3188 (October 2, 1979),

a unanimous court rejected the majority view in Daniel, and added:

> [W]e find ourselves in full agreement with Judge John Minor Wisdom's dissent in that case and with his conclusion that the same Congress which wanted employees to work in safe and healthful surroundings could not have meant for them to die at their posts. A worker should not have to choose between his job and his life without the reasonable safeguard provided by this regulation.

Marshall v. Whirlpool Corp., 593 F.2d at 736.

In those areas where circuit courts have not yet rendered decisions in cases under regulation 29 C.F.R. §1977.12(b)(2) (1979), three district courts have upheld the validity of the regulation. Marshall v. Halliburton Services, Inc., 7 OSHC 1161 (BNA, N.D. W.Va. 1979); Marshall v. Seaward Construction Co., Inc., 7 OSHC 1244 (BNA, D.N.H. 1979); and Usery v. Babcock and Wilcox Co., 424 F.Supp. 753 (E.D. Mich. 1976), in which the court said:

> [T]his Court concludes that at worst [the legislative history] is ambiguous, at best consistent with the Secretary's interpretation in Rule 1977.12(b)(2)...The Secretary's interpretation of the Act in the light of the legislative history cannot be dismissed as an unreasonable interpretation and accordingly it must stand.

Id. at 757.

This brief amicus curiae will not make a detailed analysis of the lengthy legislative history of the Act but will attempt merely to highlight some aspects of the history for the Court's consideration.

B. The So-Called Strike-With-Pay Proposal

To a great extent, Whirlpool's contention that the work refusal regulation is invalid is based on the fact that the House of Representatives did not support the so-called "strike-with-pay" proposal of Congressman Daniels. (Pet. Br.,25 et seq.). The Daniels provision required that employees be paid for doing no work in certain limited circumstances. In contrast, to the Daniels proposal, the Secretary's regulation does not require that employees

be paid when they are not working. "Read in the context of the entire debate, it is apparent that Congress' voiced concern was aimed specifically against strike with pay. No mention was made of worker's [sic] right to absent themselves from a dangerous work situation without pay." Usery v. Babcock and Wilcox Co., 424 F.Supp. 753, 756 (E.D. Mich. 1976).

Petitioner denies this contention on the basis of a single statement in the legislative history. In its Brief at 26, Whirlpool refers to a statement by Congressman Steiger of Wisconsin: "Let me emphasize again, there is nothing in our bill which authorizes strikes without pay." (Emphasis added.) The next sentence reads, "Nevertheless, if the committee bill prevails, we are going to clarify that language with an amendment." Legis. Hist. at 1075.

Since it was the committee bill which contained a strike-with-pay proposal that was going to be amended (Legis. Hist. at 986), it is evident that the reference to strike-without-pay was made in error. Nowhere else in the legislative history is there any reference to a strike-without-pay proposal.

C. The Power to Enjoin Imminently Dangerous Conditions

A second basis for Whirlpool's contention that the Secretary's regulation is invalid is the legislative history relevant to adoption of §13 of the Act, 29 U.S.C. §662. Section 13 grants federal district courts jurisdiction to enjoin workplace conditions where "a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated though the enforcement procedures otherwise provided by this Act." 29 U.S.C. §662(a). The Congressional controversy leading to the adoption of the provision concerned the

question of whether the Secretary (or his representative or an OSHA compliance inspector) should be empowered to order an operation or plant shutdown where an imminently dangerous condition was found to exist by an OSHA inspector. Concerned about the question of due process and overstepping by non-judicial government agents (Legis. Hist.,442,447-8,451-60,500,508,877,1009-10), Congress finally placed all injunctive power in the control of the courts. The refusal of Congress to grant any OSHA official the power to shut down a plant operation, even for a limited period of time, is interpreted by Whirlpoool (Pet. Br. at 32) to preclude a regulation which would give an employee such a protected right. Whirlpool, however, overstates the case, because the Secretary's regulation does not give an employee such a right. See Section II, supra. The right afforded to an employee is merely the right to personally absent himself from the hazardous work; the employer is not prohibited, except by conscience, from continuing his operation with other workers. "There is a vast amount of difference

between shutting down an entire plant and allowing a few employees to refuse a particular work assignment." Usery v. Babcock and Wilcox Co., 424 F.Supp. 753, 757 (E.D. Mich. 1976).

D. The Right to Request Inspections

The petitioner (Pet. Br. at 34) contends that by granting employees the right to request OSHA inspections of imminently dangerous conditions, 29 U.S.C. §657(f)(1); and granting the Secretary the right to petition a court for an injunction to enjoin such conditions, 29 U.S.C. §662(a); and granting federal district courts jurisdiction to issue such injunctions, 29 U.S.C. §662 (b), the Congress provided an exclusive scheme for dealing with hazardous conditions which forecloses an implied right to refuse work. Though the scheme may be applicable to most workplace situations, a moment's reflection will reveal its impracticality in other cases.

According to Whirlpool, the only procedure available to maintenance men

Deemer and Cornwell, when they did not want to comply with the order to undertake the imminently dangerous work on the overhead screens, was the procedure expressly indicated in the Act. Under that procedure, Deemer and Cornwell presumably could leave their posts to contact OSHA (though this is not explicit in the Act) to request an "imminent danger" inspection; but after making such contact they would have to undertake the imminently dangerous assignment awaiting government action. Based on considerations of workload and OSHA evaluation of the information received from Deemer and Cornwell, OSHA would schedule a worksite inspection. When the OSHA inspector eventually arrived, Whirlpool could exercise its Fourth Amendment right to deny entry to the inspector, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). The inspector would return to his office, fill out a report and start the procedure to obtain a search warrant in district court. Finally, armed with the warrant, OSHA would undertake its

inspection; but the inspection could not bring relief to Deemer and Cornwell because OSHA officials are not empowered to enjoin imminently dangerous working conditions. The inspector once more would go back to the office, fill out a report and start the procedure for a court injunction. While Deemer and Cornwell continued on their precarious perch, Whirlpool would be exercising its Fifth Amendment right to oppose the injunction. At last, days, weeks, or months later, an injunction would be issued which would allow Deemer and Cornwell to get down from the screen without fear of economic reprisal. By that time, tragedy may very well have occurred.

Congress could not have intended to prescribe such an exclusive procedure for imminently dangerous situations such as confronted Deemer and Cornwell. To avoid frustrating the purpose of the Act, Congress authorized the Secretary to promulgate regulations to effectuate the Act, 29 U.S.C. §657(g)(2), as experience revealed the necessity.

Chamber of Commerce v. OSHA, 465 F.Supp. 10 (D.D.C. 1978), appeal docketed, No. 79-2302 (D.C. Cir. October 29, 1979). The Secretary's regulation in respect to imminent danger situations is fully consonant with that Congressional intent.

IV. THE REGULATION REFLECTS, RATHER THAN CREATES, NEW LABOR POLICY.

Finally, Whirlpool argues that the Secretary's regulation reflects "a monumental change in prevailing labor policy" because it affords employees who refuse to work under imminently dangerous conditions "absolute immunity" in respect to pay or discipline. (Pet. Br. at 19). In contrast, argues the petitioner, neither §7 of the National Labor Relations Act, 29 U.S.C. §157, nor §502 of the Labor-Management Relations Act, 29 U.S.C. §143, have ever been "construed to create a right to refuse work without loss of pay." (Pet. Br. at 20).

Petitioner's argument is hinged on a misconception. Though the regulation does immunize an employee who exercises the right to refuse work from

invidious discrimination, the regulation does not require an employer to pay for those periods of time when the employee is not performing assigned work. The petitioner has not cited a single case which construed the regulation to require such payments. The courts which have held the regulation invalid have done so on the belief that Congress had been opposed to providing employees with a right to refuse work with or without pay. Usery v. Whirlpool Corp., 416 F. Supp. 30 (N.D. Ohio 1976); rev'd, 593 F.2d 715 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3188(October 2, 1979); Marshall v. Daniel Construction Co., 563 F.2d 707 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978).

It cannot be denied that the Occupational Safety and Health Act, 29 U.S.C. §651 et seq., does represent a "monumental change in prevailing labor policy." As Senator Javits said, "[t]he bill reported herewith is the most important piece of legislation affecting American workers to be considered by

in many years." Legis. Hist. at 193. For the first time, health and safety standards were to be developed and enforced on a national basis; and for the first time, American workers were given statutory protection to enable them to have a dynamic role in securing "safe and healthful working conditions." 29 U.S.C. §651(b). The Secretary's regulation reflects the change in prevailing labor policy which the Congress enacted; the regulation does not create any change in labor policy.

Prior to the passage of the Act, §7 of the National Labor Relations Act, 29 U.S.C. §157, already provided covered employees with the right to strike over health and safety issues, NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962), if the employees were involved in "concerted activity." Under §7, a single employee acting alone in his own behalf is not protected from employer retaliation, NLRB v. C. & I. Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973); NLRB v. Northern Metal Co., 440 F.2d 881

(3d Cir. 1971); though the NLRB has held that if the health and safety issue affects other employees, the actions of a single employee may rise to the level of "concerted activity." Alleluia Cushion Co., Inc., 221 N.L.R.B. 999 (1975); Interborough Contractors, Inc., 157 N.L.R.B. 1295 (1966), enforced, 388 F.2d 495 (2nd Cir. 1967). Employees covered by labor-management contracts with no-strike clauses are held to have waived their §7 right to strike over health and safety conditions except where there are "abnormally dangerous conditions of work," §502, LMRA, 29 U.S.C. §143. See Gateway Coal Co. v. UMW, 414 U.S. 368 (1974); Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974).

The Occupational Safety and Health Act protects approximately 60,000,000 workers, whereas the National Labor Relations Act protects about

40,000,000 workers. 12/ Thus the Act,

12. 124 Cong. Rec. S8419 (Exhibit 2) (daily ed. May 26, 1978). The difference between the numbers of workers covered by OSHA and the NLRB is due to the less restrictive definition of the term "employee" in the Occupational Safety and Health Act. Under §3(6), 29 U.S.C. §652(6), an employee is defined as follows:

> The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

Whereas, under §2(3) of NLRA, 29 U.S.C. §152(3), the term "employee" explicitly excludes several categories of workers:

> The term "employee" shall include any employee...but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

and the regulation being challenged here, provide rights to some 20,000,000 persons who have none of the protections afforded by the NLRA. See Dunlop v. Trumbull Asphalt Co., 4 OSHC 1847 (BNA, E.D. Mo. 1976); Marshall v. P & Z Co., 6 OSHC 1587 (BNA, D.D.C. 1978). If the regulation is held to be invalid, these 20,000,000 will be without any alternate source of protection from employer retaliation in imminent danger situations. The Act and regulation also provide rights to the 40,000,000 workers covered by the NLRA, since the regulation does not condition its protection on "concerted activity." The Act and regulation, therefore, extend and broaden employee rights under imminently dangerous conditions.

The regulation, in contrast to §7, does not give an employee the right to strike; it merely allows him to refuse to work under imminently dangerous conditions. The employee must make himself available for another work assignment,

and he may not attempt to prevent the employer from carrying on the operation with other employees.

Thus, the Secretary's regulation reflects Congressional intent to change national labor policy. If this regulation were to be invalidated, it would seriously undermine that intent.

CONCLUSION

For the foregoing reasons, the Philadelphia Area Project on Occupational Safety and Health requests this Court to affirm the decision of the Court of Appeals which held that the Secretary had not exceeded his statutory authority in promulgating regulation 29 C.F.R. §1977.12(b)(2).

Respectfully submitted,

PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA

By /s/Michael Churchill
MICHAEL CHURCHILL

JEROME BALTER

JUDITH A. DORSEY

Attorneys for
Amicus Curiae
Philadelphia Area
Project on
Occupational
Safety and Health

December 15, 1979

Public Interest Law Center
of Philadelphia
1315 Walnut St., Suite 1600
Philadelphia, Pennsylvania 19107
(215) 735-7200

IN THE

Supreme Court of the United States

October Term, 1979
No. 78-1870

WHIRLPOOL CORPORATION,
Petitioner,

vs.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF STATE OF MINNESOTA AS AMICUS CURIAE

WARREN SPANNAUS
Attorney General
State of Minnesota
STEVEN M. GUNN
Special Assistant
Attorney General
444 Lafayette Road
St. Paul, Minn. 55101
Telephone: (612) 296-6590

SHARON L'HERAULT
Special Assistant
Attorney General
444 Lafayette Road
St. Paul, Minn. 55101
Telephone: (612) 296-0214
Of Counsel

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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INTEREST OF THE STATE OF MINNESOTA

The State of Minnesota respectfully submits this Amicus Curiae brief pursuant to Rule 42(4) of the United States Supreme Court Rules, 28 U.S.C.A. in support of the Secretary of Labor's (hereinafter "Secretary's") position that his regulation, 29 C.F.R. § 1977.12, is valid and that the Sixth Circuit Court of Appeals' decision[1] from which this appeal arises is well-reasoned and should be affirmed. Whirlpool Corporation (hereinafter "Whirlpool") has appealed from that decision which reversed a lower court's holding that the Secretary's regulation, 29 C.F.R. § 1977.12, was invalid and therefore could not offer protection to two employees who had been reprimanded and suspended by Whirlpool for refusing to walk on mesh screens suspended twenty-five feet above a concrete floor.[2]

The issue in this appeal is the validity of the Secretary's regulation, 29 C.F.R. § 1977.12. The regulation, promulgated pursuant to the Secretary's rulemaking authority under the federal Occupational Safety and Health Act of 1970 (hereinafter "Act")[3] is a narrowly drawn interpretative regulation which permits employees to refuse to work, without reprisals from employers, when faced with on-the-job life-threatening situations, so long as three conditions are met. The three conditions necessary to invoke the protection of the regulation are: (1) the employee's fear that his life is in danger must

[1] *Marshall v. Whirlpool Corporation*, 493 F.2d 715 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3188 (October 1, 1979) reversing *Usery v. Whirlpool Corporation*, 416 F. Supp. 30 (N.D. Ohio 1976).

[2] Although the Sixth Circuit Court of Appeals reversed the lower court's holding, the Court of Appeals specifically affirmed the lower court's finding that the employees had refused to work because they feared that the mesh screens would not support them and that they risked falling through the screens to their death.

[3] 29 U.S.C. § 651 *et seq.*

be objectively reasonable; (2) the employee must have been unsuccessful in his attempts to get the employer to remedy the situation voluntarily; and (3) the enforcement mechanisms of the Act must be inadequate.[4] The purpose of the regu-

[4] 29 C.F.R. § 1977.12 provides:

. . . (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) *However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace.* If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. *The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.* (Emphasis added.)

lation is to fill an obvious but uncontemplated gap in the Act's protections afforded to employees who exercise their rights under the Act. This gap arises because the Act does not grant an express right to employees to refuse to work in the face of a life-threatening situation and because the Act's enforcement mechanisms are not adequate for every situation.[5]

The Secretary maintains that the regulation is a reasonable interpretation of the Act's antidiscrimination provision[6] which prohibits employers from discriminating against employees who ". . . exercise any right afforded by the Act." Whirlpool contends that the regulation is inconsistent with the express provisions of the Act and with Congressional intent.

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[5] The Act's imminent danger procedure is the problem. It is a four-step and time-consuming enforcement mechanism. This procedure is as follows:

(1) The employee must request a special inspection and the Secretary must determine that there are reasonable grounds to believe that such an imminent hazard exists. 29 U.S.C. § 657(f)(1);

(2) At the time of the inspection, the inspector must conclude that the imminent hazard exists and he must recommend that the Secretary seek judicial relief and so inform the employee. 29 U.S.C. § 662(c);

(3) The Secretary must seek relief in the district court; and

(4) The Court must determine that the imminent hazard exists. 29 U.S.C. § 662(a).

An additional step may be required if the Secretary arbitrarily fails to seek judicial relief of the imminent hazard. The employee must seek injunctive relief against the Secretary. 29 U.S.C. § 662(d). This procedure can be further delayed if the employer refuses an attempted warrantless inspection. It is for the interim period when the Act's imminent danger procedure cannot be brought into play that the regulation was designed. See also 29 C.F.R. § 1977.12(b)(2) at n. 3 infra.

[6] 29 U.S.C. § 660(c)(1) provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding *or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.* (Emphasis added.)

The interest of the State of Minnesota in the outcome of this case is significant. The Minnesota Occupational Safety and Health Act[7] is substantially similar in purpose and substance to the federal Act. In particular, both acts contain substantially identical language prohibiting employers from discriminating against employees who exercise their rights afforded by the respective acts. The State of Minnesota interprets its act to afford protection to employees who refuse to work in the face of a life-threatening situation[8] and Minnesota relies on federal interpretation and precedent to support its position. If this Court should rule against the validity of the federal regulation, and thus, against the implied right of employees to refuse to work in the face of life-threatening conditions, Minnesota's Occupational Safety and Health Act which has as its purpose ". . . to assure so far as possible every working man and woman in the state of Minnesota safe and healthful working conditions to preserve [its] human resources . . ."[9] will be thwarted. Such a decision would place the employees of the State of Minnesota and the nation in the untenable position of choosing between risking their lives or keeping their jobs. Such a result contravenes public policy and common sense. The State of Minnesota urges this Court to uphold the validity of the challenged regulation, thereby continuing the progress this decade has seen in employee safety and health.

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[7] Minn. Stat. § 182 *et seq.* (1978).

[8] A recent Minnesota Supreme Court decision, *Davis v. Boise Cascade Corp.*, No. 49660 (Minn. Sup. Ct., filed December 7, 1979) held, *inter alia*, that the antidiscrimination provision of the Minnesota Occupational Safety and Health Act did not protect an employee who had walked off the job to protest unhealthy working conditions *but who had never reported the alleged violations to the Minnesota Department of Labor and Industry* and thus had not exercised any right afforded by the Minnesota Act. This Minnesota case is inapposite to the issues involved in this appeal.

[9] Minn. Stat. § 182.65, subd. 2 (1978).

SUMMARY OF ARGUMENT

The Secretary of Labor's regulation, 29 C.F.R. § 1977.12, is a valid exercise of the Secretary's rulemaking authority. The regulation fills an obvious but uncontemplated gap in the Act's protection in recognizing the employee's right to save his life without losing his job. As such, it is wholly consistent with the stated purpose, express provisions and structure of the Act.

The challenged regulation's purpose is consistent with the Act's legislative history. Congress never considered the problem that the regulation addresses and Congress' actions regarding a so-called "strike with pay" provision and the imminent danger procedure are not dispositive. The "strike with pay" provision was offensive to Congress because of its coercive nature. It afforded employees an express and unconditional right to receive pay even though absent from work for an indeterminate amount of time and thus provided employees with a means of enforcing compliance with the Act. The rejected proposal was wholly dissimilar to the instant regulation which confers no enforcement powers on the employee and which narrowly circumscribes the conditions under which an employee is afforded the protection of the Act.

The debate in Congress over the imminent danger procedure centered on the potential abuse and due process problems of administrative shut-down orders. The imminent danger procedure was enacted along with the provision affording employees the right to request a special inspection. The two provisions were intended to interact to provide protection to employees as quickly as possible. If Congress had contemplated that the enforcement process could be significantly delayed (as it can be since this Court's holding in *Marshall v. Barlow's,*

Inc., 436 U.S. 307 (1978)), it would have expressly afforded the limited right recognized by the regulation.

ARGUMENT

A NARROWLY DRAWN REGULATION RECOGNIZING THE LIMITED RIGHT OF EMPLOYEES TO REFUSE TO WORK IN THE FACE OF LIFE-THREATENING SITUATIONS IS CONSISTENT WITH THE ACT ON ITS FACE AND IS CONSISTENT WITH THE ACT'S LEGISLATIVE HISTORY.

I. The Regulation Is A Valid Exercise Of The Secretary's Rulemaking Authority.

The principles governing this Court's review of this regulation are well recognized. A regulation will be upheld if it is reasonably related to and consistent with the purpose of the legislation as revealed in its language, structure and legislative history. See *U.S. v. Larionoff*, 431 U.S. 864 (1977); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1978), *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129 (1936). Furthermore, where, as in this case, the statute is remedial in purpose and the rulemaking authority, broad, the statute will be liberally construed and great deference will be granted to the agency's interpretation. See, *Udall v. Tallman*, 380 U.S. 1 (1965); *Lilly v. Grand Trunk Western Railroad Co.*, 317 U.S. 481 (1943). See also, *Brennan v. Southern Contractors Co.*, 492 F.2d 498 (5th Cir. 1974); *Usery v. Babcock & Wilson Co.*, 424 F. Supp. 753 (S.D. Mich. 1976). This Court has not hesitated in the past

to uphold agency action designed to render effective the remedial protections of federal legislation (See, *N.L.R.B. v. Scrivener*, 405 U.S. 117 (1972)) or to fashion substantive remedies of its own to effectuate the remedial protections of a statute. See, *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). Other courts have freely applied these principles. See, *N.L.R.B. v. Retail Store Employees Union 876*, 570 F.2d 586 (6th Cir. 1978); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977); *Rushton Mining Company v. Morton*, 520 F.2d 716 (3rd Cir. 1975); *Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals*, 504 F.2d 741 (7th Cir. 1974). The State of Minnesota urges this Court not to depart from sound precedent and to uphold the validity of the regulation.

The interpretative regulation under challenge protects from employers' reprisals those employees (1) who refuse to work out of an objectively reasonable fear that they are faced with a life-threatening situation; (2) who have been unsuccessful in getting their employers to remedy the situation voluntarily, and (3) for whom the Act's enforcement mechanisms are inadequate.[10] Such a narrowly drawn regulation, whose purpose is to state that which of necessity is implied, e.g. that an employee's refusal to work in the face of a life-threatening situation, is an exercise of a right afforded by the Act's anti-discrimination provision,[11] is well within the Secretary's broad rulemaking authority[12] under the Act. Indeed the Court

[10] See n. 4 supra.
[11] See n. 6 supra.
[12] 29 U.S.C. § 657(g)(2). It provides:
(2) The Secretary and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this act, including rules and regulations dealing with the inspection of an employer's establishment.

of Appeals' decision in *Marshall v. Daniels Construction Co., Inc.* conceded that "[t]he Secretary's regulation . . . is designed to achieve an end consistent with the purposes of the Act."[13]

II. The Regulation Is Consistent With The Purpose Of The Act.

The regulation in question is patently consistent with the stated purpose of the Act and with the language of the anti-discrimination provision itself. The unequivocal language of the Act's stated purpose ". . . to assure as far as possible the safety and health of the nation's employees and to preserve its human resources . . ."[14] is clearly broad enough to protect from employer reprisals those employees who attempt to save themselves from a life-threatening situation. Indeed, the Act imposes a general duty on an employer to furnish his employees with a work environment that is free from recognized hazards.[15] It is inconsistent with this statutory duty to allow an employer to take action against an employee who, as a last resort, removes himself from a life-threatening situation.

Notwithstanding petitioner's argument to the contrary,[16] the enumeration of employees' rights in the Act is expansive rather than exhaustive. Employees play a central role in assur-

[13] *Marshall v. Daniels Construction Co., Inc.*, 563 F.2d 707, 714 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978). This decision is in direct conflict with the Court of Appeals' decision in the instant case.
[14] 29 U.S.C. § 651(b).
[15] 29 U.S.C. § 654(a)(1).
[16] See Petitioner's Brief at 17-19.

ing that the full protection of the Act is afforded them.[17] The refusal to work in the face of a life-threatening situation during the period when the Secretary cannot be brought to the scene quickly is no less a part in that role than an employee's absenting himself for the express purpose of making a formal request for a special inspection.[18]

The Act's antidiscrimination provision (29 U.S.C. § 660 (c)(1)) cannot be interpreted to restrict its protection to specifically enumerated rights in the Act. Neither the structure nor the logic of the provision supports such a construction. First, the general language protecting employees in their exercise of *any* right afforded by the Act follows upon references to specific rights conferred by the Act (the right to file a complaint, to institute proceedings under the Act, and to testify in any proceeding under the Act). Thus, the structure of the provision itself reveals a progression from a specific to a general catch-all provision. Certainly an employee's narrowly circumscribed right to refuse to work falls within this general language. See, *N.L.R.B. v. Scrivener*, 405 U.S. 117 (1973); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977); *Smith v. Columbus Metropolitan Housing Authority*, 443 F. Supp. 61 (S.D. Ohio 1977); *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), certiorari denied, 420 U.S. 938 (1975); *Dunlop v. Hanover Shoe Farms, Inc.*, 441 F. Supp. 385 (D.C. Pa. 1976).

[17] 29 U.S.C. § 655(b)(1) (right to submit information to the Secretary on the need for a standard); 29 U.S.C. §§ 655(b)(6)(A), 655 (b)(6)(B) and 655(d) (variances: right to notice of application for, right to petition for hearing on, right to participate in hearing on, right to petition for modification or revocation; 29 U.S.C. § 655(b)(7) (right to appropriate warnings, protective equipment, and medical examinations); 29 U.S.C. § 655(f) (right to challenge standard); 29 U.S.C. § 657(a)(2) (right to consult privately with inspectors); 29 U.S.C. § 657(c)(1) (right to be informed of employers' obligations under the Act); 29 U.S.C. § 657(c)(3) (right to be informed of monitoring of and exposure to toxic substances); 29 U.S.C. § 657(f)(1) (right to request special inspections); 29 U.S.C. § 657(f)(2) (right to notify Secretary/inspector of probable violations); 29 U.S.C. § 658(b) (right to notice of citation); 29 U.S.C. § 659(c) (right to contest an abatement period); 29 U.S.C. § 660(a) (right to appeal Review Commission's orders to Circuit Courts of Appeals); 29 U.S.C. §§ 660(c)(1), 660(c)(2), 660(c)(3) (right to file complaints, institute proceedings or testify and to file claim with Secretary for employer's discriminatory action and to be informed of Secretary's decision); 29 U.S.C. § 662(d) (right to seek judicial relief from imminent danger if Secretary arbitrarily fails to do so).

[18] The Court of Appeals' decision in the instant case recognizes that this latter act is within the express protection of the Act's antidiscrimination provision. See, *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 723 (6th Cir. 1979), cert. granted, 48 U.S.L.W. 3188 (October 1, 1979).

In *Phillips, supra*, the Appeals Court construed the federal Coal Mine Health and Safety Act's antidiscrimination provision to protect an employee who refused a hazardous work assignment after repeated unsuccessful attempts to get his foreman to remedy the situation. The court reasoned that such refusal was an implied first step in the complaint procedure[19] and was thus clearly protected by federal law. That provision mentioned only specific rights such as the right to file a complaint, institute a proceeding or testify in a proceeding and did not contain language protecting *any right* afforded by the Act.[20] In 1977, when Congress considered what was to be the

[19] Although the company had a complaint procedure, the first step of which was to bring the complaint to the foreman's attention, employees' rights should not hinge on whether or not the company is enlightened enough to develop an internal complaint procedure. See, *Marshall v. Whirlpool Corp.*, 593 F.2d at 735 n. 18 (6th Cir. 1979).

[20] The Mine Coal Health and Safety Act, 30 U.S.C. § 820(b)(1) provided:

> (b)(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 *et seq.*, it approved the *Phillips* Court's construction of the Coal Mine Safety and Health Act's antidiscrimination provision and specifically amended the antidiscrimination provision to include the following language:[21]

> "No person shall discharge or in any manner discriminate . . . [against a miner, representative of miners or applicants] . . . *because of the exercise by such miner, representative of miners, or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.*" (Emphasis added.)

The antidiscrimination provision of the federal Mine Safety and Health Amendments Act of 1977 as amended to afford

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[21] 30 U.S.C. § 815(c)(1) provides:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or *because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.*

(Emphasis added.) See 1977 U.S. Code Cong. & Ad. News at 36. With respect to the federal Mine Safety and Health Amendments of 1977 which amended the Mine Safety and Health Act's antidiscrimination provision, the Senate report said that it was Congress' intent "to insure the continuing vitality of the various judicial interpretations of the [antidiscrimination provision] . . . which are consistent with the broad protection of the bill's provisions . . . ."

protection to the exercise of any right afforded by the act is substantially identical to the antidiscrimination provision in this case. The conclusion is inescapable that Congress intended that such language which affords protection to *the exercise of any right* under the *acts be broad and cover all rights*, express or implied, whether specifically conferred or not.

A broad construction of the language of the antidiscrimination provision is, however, not necessary. The right recognized by the regulation here neither enlarges rights expressly conferred by the Act nor creates a new right. The regulation states the obvious. An employee's attempt to save himself is an implied first step in a complaint procedure which is expressly protected by the antidiscrimination provision. To withhold that protection unless the refusal is contemporaneous with the initiation of a complaint creates an absurdity. *Compare* the lower court's opinion herein, *Marshall v. Whirlpool Corp., supra*, at 723 (noting that the Act's protections ". . . should not hinge on whether an employee knows enough to keep within OSHA's protections by making obvious efforts to find an OSHA inspector immediately.") *with Marshall v. Daniels Construction Co., Inc., supra* at 716 (where the court suggested that the employee may have been able to avail himself of the protection of the Act if he had alleged that he was fired ". . . for temporarily absenting himself from his job so that he might request an OHSA inspection and give notice of the dangerous condition.").

Finally, there are no countervailing considerations. Whirlpool's suggestion that the National Labor Relations Act (hereinafter "NLRA") controls the area of an employee's right to refuse work in the face of a life-threatening situation and that the Secretary's regulation would seriously disrupt pre-

vailing labor-relations policy is without merit.[22] Indeed, Whirlpool's reliance on Section 502 of the NLRA, 29 U.S.C. § 143,[23] is misplaced. The regulation under challenge in this appeal neither enlarges nor creates employees' rights that do not already exist under Section 502. Thus, Section 502 lends support to the Secretary's position that his regulation neither disrupts labor-management relations nor conflicts with Congressional intent. Whirlpool suggests that cases may arise where there is a fine distinction between a labor relations issue such as insubordination and the exercise of a right protected under the Act and that such cases are better resolved in other forums.[24] The courts are eminently well equipped to deal with the factual and jurisdictional issues. See, e.g. *Phillips v. Interior Board of Mine Operations Appeals, supra*; *Smith v. Columbus Housing Authority,* 443 F. Supp. 61 (S.D. Ohio 1977); *Davis v. Boise Cascade Corp.*, No. 49660 (Minn. Sup. Ct., filed December 7, 1979). The specter of endless litigation should not mislead this Court into choosing efficient court administration over employees' lives.

In sum, the regulation, 29 C.F.R. § 1977.12, is wholly consistent with the purpose, structure and language of the Act, is well within the Secretary's rulemaking authority and is grounded in sound public policy.

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[22] See Petitioner's Brief at 19.

[23] 29 U.S.C. § 143. It provides:

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

[24] See Petitioner's Brief at 16.

III. Nothing In The Legislative History Of The Act Suggests That Congress Intended To Deny Employees The Right To Refuse To Work In Life-Threatening Situations.

Whirlpool argues that two events in the legislative history of the Act[25] indicate that Congress deliberately withheld

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[25] See 116 Cong. Rec. 36508-09, 36511-523, 35629-39; 37317-347; 37601-40; 38366-403; 38702-38733; 41753-764; 42199-209; 1970 U.S. Code Cong. & Ad. News 5177-5241. An able synthesis of this history was made by Circuit Judge Keith in the Court of Appeals decision below and is set forth below:

> We begin our study of the legislative history of the Occupational Safety and Health Act with the so-called Daniels Bill, H.R. 16785 (1970), which was reported out of the House Education and Labor Committee. The Daniels Bill contained a subsection 19(a)(5), which allowed employees to absent themselves from their job, with pay, when exposed to substances which had a potentially toxic or harmful effect when found or used at certain levels in the workplace, unless their employer provided appropriate warning labels and protective equipment which allowed them to carry out their work without being harmed. Opponents of the Bill attacked this subsection as guaranteeing workers the right to "strike with pay," a label which proved to be its downfall. Unhappy with this and other provisions in the Daniels Bill, Congressman Steiger of Wisconsin introduced a substitute bill on the floor of the House which *inter alia* did not contain a "strike with pay" provision. See H.R. 19200 (1970), reprinted in Legislative History at 763.
>
> Confronted with strong opposition on a variety of grounds, Congressman Daniels responded, *inter alia,* by offering to substitute a provision giving employees the right to request that the Secretary immediately inspect the premises. He explained:
>
> > 'The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk or harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm.'
>
> 116 Cong. Record, 38377-78 (1970), reprinted in Legislative History at 1009. See also 116 Congressional Record 38369 (1970), reprinted in Legislative History at 936 (Congressman Perkins); 116 Congressional Record 38376 (1970), reprinted in Legislative History at 1005 (Congressman Daniels).
>
> Notwithstanding Representative Daniels' efforts to make his own bill more palatable, the House voted it down and instead

from employees a right to refuse to work in the face of a life-threatening situation. Those two events were Congress' rejection of the so-called "strike with pay" provision and its enactment of the imminent danger procedure.

A. "Strike with Pay."

In the course of the debates over the passage of the Act, Congress reacted negatively and rejected the House (Daniels) Bill's so-called "strike with pay" provision. This provision would have permitted employees to protect themselves from the adverse effects of their exposure to toxic substances by absenting themselves from work with pay.[26] It is easy to understand why such a provision was offensive to Congress. The provision would have given employees an unconditional right to refuse to work for an indefinite period and to get paid for not working. An employer's work operation could be seriously disrupted in situations where the hazard was less than imminent. It is apparent that it was the coercive potential of this provision which gave enforcement powers to employees which disturbed the Congress. In presenting an amendment which would have deleted the "strike with pay" provision but which would have given employees the right to request an immediate inspection, Representative Daniels said:

> [I]nstead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, *we have strengthened the enforcement* by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm.

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passed the alternative Steiger bill. That bill said nothing about employees walking off the job, but allowed the Secretary to obtain temporary restraining orders from a Federal Court to enjoin imminent dangers in a workplace. If the Secretary unreasonably failed to seek this relief, an employee who was injured as a result could sue the United States in the Court of Claims.

Action in the Senate began with the reporting out of Committee of the Williams Occupational Safety and Health Bill. The Williams Bill did not contain a "strike with pay" provision. However, it did provide that in imminent danger situations, an employee had the right to make a written request for an immediate inspection. Although the Williams Bill had some controversial provisions, it survived intact and passed the Senate.

In House-Senate Conference, the Senate was largely successful in retaining the provisions of the Williams bill. In particular, the Senate's provision, giving employees the additional right to contact the Secretary and to get an inspector on the scene at once was acceded to by the House. Conference Report No. 91-1765, reprinted in Legislative History at 1154, 1164-65; 1190-1191 and reprinted in 1970 U.S. Code Cong'l and Admin. News 5228, 5334. The Act as finally adopted incorporates this compromise. 29 U.S.C. § 657(f).

Marshall v. Whirlpool Corp., 593 F.2d at 727-30 (6th Cir. 1979) cert. granted, 48 U.S.L.W. 3188 (October 1, 1979).

[26] This section (§ 19(a)(5) of the Daniels bill) provided:

> The Secretary of Health, Education and Welfare shall publish within six months of enactment of this Act and thereafter as needed, but at least annually, a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potential toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substances designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period. H.R. 16785 § 19 (a), (1970), reprinted in Legislative History at 755-56, and reprinted in H. Rep. No. 91-1291, 91st Cong. 2d Sess. 12 (1970), reprinted in Legislative History at 842.

116 Cong. Rec. at 38377-78 (1970) (Emphasis added.) In preferring a right to request an immediate inspection over the indeterminate right of employees to absent themselves from a toxic environment, Congress merely expressed an intent to confine the enforcement of the Act to the appropriate federal or state agencies. Congress did not want to enable employees to *enforce* an employer's compliance with the Act's provisions. Congress found it desirable instead to enable an employer to trigger an enforcement inspection as quickly as possible. A limited right to refuse work as an interim step to initiating the inspection procedure is consistent with the intent of Congress to limit enforcement to the respective government agencies.

The Secretary has not attempted by the promulgation of 29 C.F.R. § 1977.12 to circumvent congressional intent. The regulation in question is not a "strike with pay" regulation.[27] The regulation applies only in life-threatening situations where statutory enforcement mechanisms are inadequate. It confers no enforcement powers on the employee and creates no rights not already available under § 502 of the NLRA.

[27] See, *Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir. 1979), cert. granted 48 U.S.L.W. 3188 (October 1, 1979). In emphasizing the total dissimilarity between 29 C.F.R. § 1977.12 and the proposed strike with pay provision, the Court of Appeals noted that it was the monetary incentive that Congress rejected. Whether or not an employee can receive pay for the exercise of his rights under 29 C.F.R. § 1977.12 is not dispositive of the regulation's validity, however. The employee's right is hardly unconditional. The employee must meet the burden of proof that all the conditions of the regulation have been met.

B. "Imminent Danger" Procedure.

The legislative history surrounding the enactment of the Act's imminent danger procedure (29 U.S.C. § 662) demonstrates that Congress did not intend the imminent danger procedure to be the exclusive remedy of employees faced with a life-threatening situation. The Congressional debate on the imminent danger procedure focused on the due process and political problems associated with the issuance of an administrative, rather than a judicial, shut-down order.[28] That employees might cause a shut-down was not discussed. Indeed, such actions by employees was not a concern given Congress' awareness of said employee's rights under the NLRA.[29]

The imminent danger procedure is a mechanism whereby governmental enforcement is triggered. Its enactment cannot be construed as an attempt to foreclose employees' right to refuse to work to save themselves from a life-threatening situation.

[28] See, e.g. 116 Cong. Rec. at 37326 (Senator Williams) (Speaking on an inspector's authority, upon consultation with the Secretary, to order a 72 hour shut-down: "The committee adopted a number of amendments to provide every assurance that this authority would not be used arbitrarily or unnecesarily, nor in a manner to cause undue economic harm."); 116 Cong. Rec. at 37338 (Senator Dominick) ("[A]ll he has to do—one man, as an inspector—is to call the regional office or somebody else in the Labor Department and shut down the whole plant immediately, by an order, without any court findings, without any adjudication, without any due process."); 116 Cong. Rec. at 37346 (Senator Tower); 116 Cong. Rec. at 37602 (Senator Saxbe); 116 Cong. Rec. at 37602 (Senator Schweiker); 116 Cong. Rec. at 38368 (Rep. Anderson) (The judicial order is "more responsible and equitable than granting this arbitrary power to an inspector."); 116 Cong. Rec. at 38376 (Rep. Daniels); see also, 1970 U.S. Code Cong. & Ad. News 4189-90, 5221, and 5227 (Minority Views of Dominick and Smith).
The proposed provisions that would have allowed an inspector, either on his own or after consultation with the Secretary or his regional representative, to issue a shut-down order were rejected in favor of the provision requiring a court order. See 29 U.S.C. § 662.

[29] See, 116 Cong. Rec. at 422.

Finally, one aspect of the legislative history surrounding the enactment of the imminent danger procedure is most revealing of what Congress would have done had it specifically addressed the issue of employees' right to withdraw from a life-threatening situation during the interim period when the Act's enforcement mechanisms cannot be brought into play. The Act as adopted contains both an employee right to request an immediate safety and health inspection and a provision permitting the Secretary to obtain a judicial shut-down order. Congress understood that these two provisions would interact so that enforcement could proceed expeditiously thereby minimizing employee exposure to imminent hazards. Congress did not consider that these procedures would not be adequate. See, e.g. 116 Cong. Rec. at 37338 (Senator Dominick) (Regarding the substitute bill's provision requiring judicial action to shut down a plant: "You can get an ex parte order in a half hour. Therefore, there is no merit to the argument that employees will be subject to hazards they shouldn't be."); 116 Cong. Rec. at 37340-41 (Senator Williams) Regarding the right to request immediate inspections: "The substitute bill has absolutely no comparable provision for what in so many clearly life and death instances is the minimum assurance to which the employee is entitled."); 116 Cong. Rec. at 37602 (Senator Schweiker); 116 Cong. Rec. at 38376 (Representative Daniels) (Regarding his amendments deleting the "strike with pay" provision and adding an imminent danger procedure relying exclusively on judicial action: "Our intention is that the Secretary resort to the courts with utmost speed . . . [and] our provision reflects our trust that the courts will be able to respond with the speed that is needed.") See also, Sen. Rep. No. 91-1282 (The Committee on Labor and Public Welfare), 1970 U.S. Code Cong. & Ad. News at 5188.

Indeed Congress intended that special inspections would proceed "without delay."[30]

However, that presumption was predicated on: (1) employer willingness to remove employees from an imminent danger voluntarily; (2) round-the-clock accessibility of the Secretary or his agents; and (3) the swiftness of the judicial process. See, e.g. 116 Cong. Rec. 37341 (Sen. Williams); 116 Cong. Rec. at 37602 (Sen. Saxbe); 116 Cong. Rec. at 38376 (Rep. Daniels). Unfortunately, Congress' confidence in the accuracy of these presumptions has not been supported. Obviously, not all employers will cooperate by voluntarily removing imminent dangers from workplaces. Furthermore, this Court's decision in *Marshall v. Barlow's, Inc., supra*, acknowledging an employer's Fourth Amendment right to refuse a warrantless safety and health inspection, has significantly impaired the protection afforded employees by the imminent danger procedure. The employer's exercise of his Fourth Amendment rights significantly delays the Act's imminent danger procedure because the Secretary is forced to seek a warrant. Without the protection of the regulation under challenge, employee exposure to life-threatening hazards is significantly prolonged during the time it takes the Secretary to obtain a court order. Congress did not intend the Act's imminent danger procedure to be meaningless in some circumstances. The remedial effect of the Act in life-threatening situations cannot depend solely on the willingness of an employer to waive his constitutional rights. The Court should uphold the validity of the Secretary's regulation which recognizes a very reasonable but limited protection for employees. Such protection is inherent in the Act.

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[30] 29 U.S.C. § 657(a)(1).

Employee safety was not bargained away when Congress included an imminent danger procedure within the Act's protections. Employees must retain a minimum right to withdraw from life-threatening situations and to do so without fear of employer reprisals. An employee should not have to choose between his job and his life.[31]

[31] In his dissenting opinion in the *Daniels* decision, Judge Minor Wisdom said:
"The Congress that passed this Act did not intend to put the worker to the choice—his job or his life . . . Congress felt that workers could live with the proscribed processes of this Act. I cannot believe that it required workers to die for them . . .".
Marshall v. Daniels Construction Co., Inc., 563 F.2d at 722.

CONCLUSION

For the foregoing reasons, the State of Minnesota urges this Court to affirm the decision of the Sixth Circuit Court of Appeals and uphold the validity of the Secretary's regulation, 29 C.F.R. § 1977.12.

Dated: December 21, 1979.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
STEVEN M. GUNN
Special Assistant
Attorney General
444 Lafayette Road
St. Paul, Minnesota 55101
Telephone: (612) 296-6590
Amicus Curiae

SHARON L'HERAULT
Special Assistant
Attorney General
444 Lafayette Road
St. Paul, Minnesota 55101
Telephone: (612) 296-0214
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1870

WHIRLPOOL CORPORATION,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AMICUS CURIAE

Of Counsel:

STEPHEN A. BOKAT
STANLEY T. KALECZYC
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062

ROBERT T. THOMPSON
GARY S. KLEIN
THOMPSON, MANN & HUTSON
1511 K Street, N.W.
Washington, D.C. 20005

Attorneys for the Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States is the largest association of business and professional organizations in the United States and is a principal spokesman for the American business community. The Chamber of

[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

Commerce has a direct membership of over 3,700 state and local chambers of commerce and professional and trade associations, and a business membership in excess of 86,000 business firms and individuals.

In order to represent its members' views on questions of importance to their vital interests, and to provide such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in cases concerning the interpretation of the Occupational Safety and Health Act of 1970.[2]

The issue presented in this case, whether the Secretary of Labor is authorized to promulgate a regulation, which, by his own admission, is suggested neither by the statute itself nor its legislative history, granting to employees a new right to refuse to work based on a subjective belief that a hazardous condition exists, is of significant interest to members of the Chamber for several reasons. First, affirmance of the regulation would signify a broad expansion of the specific rights and duties contained in the statute which are designed to assure that swift but orderly and objective procedures are followed in situations to which the regulation is addressed. In lieu of this carefully worked out statutory scheme the regulation, because of its inherent subjectivity, raises the potential for conflict and confrontation which is at odds not only with the purpose of the statute itself, but with the overall labor-management relations policy as set forth in the National Labor Relations Act, and as interpreted by this Court.

Equally important to members of the Chamber is the proposition, advanced by the lower court and the media, that the regulation is necessary to eliminate the Hobson's

[2] See, e.g., *Marshall* v. *Barlows, Inc.*, 436 U.S. 307 (1978); *Marshall* v. *American Petroleum Institute, et al.* No. 78-1036 (pending).

choice between jobs and safety. This hyperbolic assessment of the impact of the regulation is unfortunate and untrue. It is unfortunate because it tends to obscure the merits of the arguments advanced in favor of and against the regulation, and because it gives credence to the unfounded premise that employers operate in callous disregard for the safety of their employees; a premise Congress specifically rejected. It is untrue because, in reality, employees are never faced with such a choice. Indeed, the statute's explicit provisions and the Secretary's procedures for implementing them protect employees who believe they are in danger and who then exercise their express right to request a special investigation by the Secretary of the allegedly hazardous condition, and assure that the matter will be handled expeditiously yet orderly. Accordingly, the Secretary's regulation is unwarranted and its negative impact on labor-management relations unnecessary to carry out the purposes of the statute.

For these reasons, the Chamber respectfully submits this brief in support of Petitioner's contention that the decision below be reversed.

QUESTION PRESENTED

Whether the lower court erroneously concluded that the Occupational Safety and Health Act of 1970, by implication, authorizes the Secretary to promulgate a regulation granting to employees a new right to refuse to work based on the employee's own subjective determination that he or she would be exposed to an immediate danger, without resort to the expressly established statutory procedure for dealing with such situations.

SUMMARY OF THE ARGUMENT

I.

The determination of whether a statute contains by implication what it does not expressly contain requires an analytical method which closely examines the scheme of the statute, its legislative history, and the effect a finding of an implied right would have on the system established by Congress to accomplish the purpose of the statute. Applying this methodology to the issue herein presented leads to the inescapable conclusion that the court below erred in implying the right sought by the Secretary. The statute itself is internally cohesive, providing for numerous express rights exercisable by employees to assure their participation in its enforcement. With respect to conditions constituting imminent dangers, the Act specifically grants to employees the right to trigger a special inspection, grants to the Secretary the power to go to court to seek relief, and reposes in the courts the exclusive authority to determine, in fact, that such a condition exists and to suspend all or part of an employer's operation. Under well recognized principles of statutory construction, the affirmative description of a particular power or remedy in legislation implies denial of a non-described power, and precludes the expansion of the coverage of the statute to subsume other remedies unless clear evidence of legislative intent demonstrates a contrary result. *Continental Casualty Co.* v. *United States*, 314 U.S. 527 (1942); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974). Thus, mere consistency with the statute's general policy is an insufficient basis upon which to sustain this regulation. See, *Leone* v. *Mobil Oil Corp.*, 523 F.2d 1153, 1161 (C.A.D.C. 1975).

The legislative history of the statute, rather than demonstrating a contrary intent to imply the right created

by the Secretary, provides both explicit and implicit indications of an intent to deny employees that right. Congress explicitly rejected giving employees any right to walk off the job with pay, and implicitly rejected any right to self-help by enacting the closely linked request for inspection and imminent danger provisions as an alternative to this right. Moreover, the steady movement of Congress away from giving one person, the inspector in the field, the power to suspend operations to finally giving such power only to federal courts, implies rejection of the idea that any other person should have this power. In short, clear evidence of legislative intent stands in the way of the lower court's implied right theory, and its attempt to dismiss this history as irrelevant is misplaced. Indeed, the lower court overlooked a recent amendment by the Secretary of his interpretation of the anti-discrimination provision, which provides that failure by employers to pay employees for non-work time spent in the exercise of their right to participate in an inspection constitutes discrimination under the Act. Applying the rationale behind this interpretation to the implied right in question demonstrates the fallacy in the lower court's conclusion that an employee who exercises this implied right must be prepared to forego pay, and establishes the fact that the decision below sets up the so-called "strike with pay" provision that Congress expressly rejected.

Finally, it is evident that the implication of an employee right to walk off the job upon only his or her own belief in the existence of a danger would frustrate the specific purpose of the statute, that orderly and objective procedures be followed to determine the actual existence of danger, and thereupon to invoke all appropriate federal judicial powers to protect employees. Moreover, the implication of such a right would impede the general purpose of encouraging industrial stability by leading to end-

less disputes in federal court over all the subjective criteria employed in the regulation to determine whether such walkouts are justified. Such results are unnecessary for the Act and the Secretary's procedures assure ample protection for employees.

II.

The Secretary's regulation improperly intrudes into the national labor relations policy favoring collective bargaining. Specifically, the regulation alters the rights and remedies involved in the enforcement of no-strike—no-lockout, and binding arbitration clauses in such agreements.

ARGUMENT

I. THE RIGHT CREATED BY THE SECRETARY IS NOT SUPPCRTED BY THE LANGUAGE OF THE ACT OR ITS LEGISLATIVE HISTORY AND CANNOT BE RECONCILED WITH THE STATUTORY SCHEME.

A. The Right Created by the Secretary Cannot Be Found Within the Four Corners of the Act Which Expressly Creates Numerous Employee Rights and Remedies Including Those Applicable to Imminent Danger Situations.

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (hereinafter the Act) is a carefully drafted, interwoven series of interdependent provisions designed to accomplish the Congressional purpose "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . ." 29 U.S.C. § 651(b). To effectuate this broad purpose the Act provides for numerous rights, duties and responsibilities on those parties encompassed by the Act; employers, employees and the Secretary of Labor.

Employers have the final and exclusive responsibility to assure that they are providing a safe and healthful workplace. Thus, the Act imposes upon the employer the duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm",[3] and to comply with occupational safety and health standards promulgated under the Act. 29 U.S.C. § 654(a)(1), (2). Employers who violate their compliance duty face liability in the form of monetary penalties which are potentially severe. 29 U.S.C. § 666(a)-(e). Of particular pertinence here is the fact that an employer who commits a "willful" violation of the Act may be assessed a penalty of $10,000, 29 U.S.C. § 666(a), and if such a violation results in death an employer faces possible imprisonment. 29 U.S.C. § 666(e).[4]

The primary responsibility of the Secretary of Labor (hereafter the Secretary) under the statutory scheme is to enforce the provisions of the Act to assure that employers are complying with its mandates. Thus, in addition to his power to promulgate mandatory safety and health standards (29 U.S.C. § 655) the Secretary is authorized to inspect every workplace covered by the Act and, if he finds a violation, to prosecute employers and bring about expeditious abatement of the condition. 29 U.S.C. §§ 657(a); 658(a), 659. With respect to condi-

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[3] This is the "general duty" provision which has been interpreted to include hazards detectable by mechanical devices, the human senses, and those of which an employer had actual knowledge. See, *American Zinc and Refining Co.* v. *OSHRC*, 501 F.2d 504 (C.A. 8 1974); *Brennan* v. *OSHRC*, 501 F.2d 1196 (C.A. 7 1974).

[4] The term "willful" is not defined by the Act but has been construed to mean an action done voluntarily, with either an intentional disregard of, or plain indifference to the Act's requirements. See, *Intercounty Construction Co.* v. *OSHRC*, 522 F.2d 777, 779-80 (C.A. 4 1975); *Georgia Electric Co.* v. *Marshall*, 595 F.2d 309, 318-19 (C.A. 5 1979).

tions that the Secretary believes constitute imminent dangers, the Act provides (29 U.S.C. § 662(a)):

> The United States district courts shall have jurisdiction, *upon petition of the Secretary*, to restrain any conditions or practices in any place of employment which are such that a danger exists which *could reasonably be expected to cause death or serious physical harm immediately* or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger *and prohibit the employment or presence of any individual in locations or conditions where such imminent danger exists*, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, *or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.* (Emphasis added).

Employees have a duty to comply with safety regulations, 29 U.S.C. § 654(b), but ". . . Congress did not intend to confer on the Secretary or the Commission the power to sanction employees. . . . It seems clear that this enforcement scheme is directed only at employers." *Atlantic and Gulf Stevedores, Inc.* v. *OSHRC*, 534 F.2d 541, 553 (C.A. 3 1976). However, it is clear that Congress intended for employees to play an integral role in the Act's overall scheme, both as intermediaries between employers and the Secretary to assure that each is carrying out their respective duties, and as parties in situations affecting their vital interests. To effectuate this purpose, Congress granted to employees a number of express rights, covering all contingencies, designed to involve

the employees in all aspects of the Act's provisions. Moreover, to insure that employees are protected in the exercise of such rights, Congress enacted an anti-discrimination provision, the implications of which are at issue in this case, providing as follows (29 U.S.C. § 660(c)(1)):

> *No person shall discharge* or in any manner discriminate against *any employee* because such employee has filed any complaint *or instituted or caused to be instituted any proceeding under or related to this Act* or has testified or is about to testify in any such proceeding or *because of the exercise by such employee* on behalf of himself or others *of any right afforded by this Act.* (Emphasis added).

The broad array of rights encompassed by this provision are impressive, and include the following:

> —with respect to applications filed by employers seeking a variance from a standard, the right to receive notice of such application; the right to petition for a hearing on such application; the right to participate in such hearings, and the right to apply for modification or revocation of any order granting the variance application (29 U.S.C. §§ 655(b)(6)(A), (B) 655(d));
>
> —the right to challenge in the courts of appeal the validity of any standard promulgated by the Secretary (29 U.S.C. § 655(f));
>
> —the right to be advised, through prominent posting, of citations issued to the employer alleging a violation of the Act (29 U.S.C. § 658(b));
>
> —the right to contest the reasonableness of any abatement period set by the Secretary for the correction of the violation (29 U.S.C. § 659(c));
>
> —the right to accompany an inspector and the right to consult privately with the inspector during inspections (29 U.S.C. §§ 657(a)(2), 657(e));

—the right to participate as parties in hearings on citations issued their employer (29 U.S.C. § 659(c));

—the right to petition the courts of appeal to review final orders determining the validity of citations issued to their employers (29 U.S.C. § 660(a)).

Although none of the foregoing rights expressly created in the Act are specifically referred to in the anti-discrimination provision, 29 U.S.C. § 660(c)(1), it is beyond dispute that such rights fall within the scope of that section's protection against discrimination because of the exercise of "any right afforded by this Act."[5] These are by no means the only rights which employees may exercise. The Act specifically creates other rights which are intimately related to the Act's request for inspection and imminent danger provisions. This cohesive scheme of additional rights is embraced by the protection which the anti-discrimination provision affords the employee who "has filed any complaint or instituted . . . any proceeding under or related to this Act," and involves employees in the process of detecting, reporting and correcting potential violations of the Act including imminent dangers. Moreover, in creating this cohesive scheme of rights, the Act enumerates in detail the steps employees are to take when they believe that such conditions exist in the workplace, be they ordinary violations or imminent dangers.

Thus, with regard to the employee right, exercisable at any time, to notify inspectors of violations believed to exist in the workplace, the Act provides (29 U.S.C. § 657(f)(2)):

> Prior to or during any inspection of a workplace, any employees or representatives of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they have reason to believe exists in such workplace . . . .

[5] This section itself creates a right of an employee to be secure against discharge or discrimination because he or she "has testified or is about to testify" in any proceeding under the Act.

With regard to the employee right, exercisable at any time, to request a special inspection if it is believed that an imminent danger exists, the Act provides (29 U.S.C. § 657(f)(1)):

> Any employees or representatives of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representatives of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

This request for inspection provision flows logically into the "imminent danger" provision, 29 U.S.C. § 662(a), *supra*, which empowers the Secretary to petition the courts for an order restraining such conditions, and em-

powers the courts to grant any appropriate relief, including the withdrawal of employees and the cessation of all or part of a business operation.

As the foregoing enumeration of the rights created in the Act makes clear, an employee has specified rights, protected by the anti-discrimination provision, which he or she may exercise *at any time* there is a belief that violations exist at the workplace which threaten physical harm or imminent danger. If at any time an employee believes such violations exist, he or she has the right to request a special inspection by the Secretary and the right to be informed quickly of the Secretary's determination of whether to invoke the power of the federal courts to remedy the situation including, if necessary, the power to order withdrawal of employees and shut down operations.[6] Indeed, the employee has the express right to bring his or her own action in federal courts to compel the Secretary to take action where it is believed that the Secretary's failure to seek a court order is unjustified. 29 U.S.C. § 662(d).

It is against this statutory scheme that the decision to create an implied right must be tested. Significantly, the Secretary acknowledges in his regulation that "review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of" . . . potentially dangerous conditions. 29 C.F.R. § 1977.12(b)(1). Nevertheless, the regulation goes on to state, in the provision here in dispute, 29 C.F.R. § 1977.12(b)(2):

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[6] The Secretary has instructed that "[e]xcept in extraordinary circumstances, any inspection [in response to an imminent danger allegation] should be conducted within 24 hours of receipt of the allegation." OSHA *Field Operations Manual*, 1 CCH Employment Safety and Health Guide, § 4370.3 (Jan. 1979).

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

The Secretary has thus concluded that, under the facts he has laid out in the regulation, employees do have the right to refuse to work. The inconsistency of this conclusion with the express provisions of the Act is patent. Indeed, the foregoing enumeration of the rights created in the Act makes it clear that the Act deliberately withholds from the employee the right to make the determination that a dangerous situation *may* in fact exist. The Act gives that right *in the first instance* only to the inspector and through the inspector to the Secretary of Labor. And the foregoing enumeration makes it manifestly clear that the employee does not have the right to make the *final* determination that a dangerous situation *does* in fact exist and that business operations must therefore be halted—by his walkout. The Act withholds that right—that power—from even the inspectors and the Secretary himself, and gives it only to the federal courts. The absence of an employee right to walk off the job is

carefully balanced in the Act by the presence of the provisions which directly involve the employee in every respect of the Act's administration, and explicitly protect an employee who "institutes or caused to be instituted" any proceeding under the Act, including the provision which makes the employee the one who sets in motion the Act's imminent danger procedure.

In applying an analysis similar to the foregoing, the Fifth Circuit agreed with the Secretary's analysis and found that nothing in the Act created or authorized the implied right granted in the regulation. *Marshall* v. *Daniel Construction Co., Inc.*, 563 F.2d 707 (C.A. 5 1977), *cert. den.* —— U.S. —— (No. 77-1697, 1978); *accord*, *Marshall* v. *Certified Welding Corp.*, —— F.2d ——, No. 772048 (C.A. 10 1978). In direct contradiction, the lower court determined that the regulation creating the right was a proper exercise of the Secretary's authority. *Whirlpool* v. *Marshall*, 593 F.2d 715 (C.A. 6 1974).

Significantly, the lower court does not disagree with the conclusion of the other circuit courts that there is no express right granted in the Act from which the implied right logically flows. Rather, the lower court relies on the broad policy of the Act, which the court then terms a "right", and declares that the Secretary's regulation is consistent with this policy, and thus permits through administrative fiat what was legislatively denied.[7] In so

[7] *Id.* at 722. The lower court's construction of the Act's broad policy is apparently based on the dissenting opinion in *Daniel, supra* at 718, wherein it was noted that the regulation "can be interpreted as embodying one of the 'other rights' mentioned in 11(c)(1) [29 U.S.C. § 660(c)(1)], a right to safe conditions implicit in the entire law." But the dissent's use of quotation marks around the phrase "other rights" is puzzling since that phrase does not appear at all in 29 U.S.C. § 660(c)(1). This provision protects an employee who exercises "on behalf of himself or others . . . any right afforded by this Act."

doing, it cannot be disputed that the lower court has dramatically expanded the careful scheme of the Act's request for inspection and imminent danger provisions, the end result being that employees, not federal judges, would have the power to suspend operations, a result the Act clearly rejects. Such a result cannot be found by implication within the four corners of the Act without a total disruption of its carefully constructed scheme. Thus, the lower court's holding completely ignores this Court's admonition that the duty of the judiciary in construing legislation is to examine the words employed by Congress ". . . to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases, More Or Less, Each Containing Six Jars of Jam* v. *United States*, 340 U.S. 593, 596 (1951).

Indeed, mere reliance on general policy is insufficient to imply a right in an otherwise explicit, comprehensive scheme. As the District of Columbia Circuit Court noted, in rejecting an argument that this Act's overall policy could support an implied right:

> Although many arguments could be addressed *to Congress* advocating that [the right] be granted . . . these policy arguments cannot serve as a basis for judicial supplementation of the expansive statutory scheme. (Emphasis added).

Leone v. *Mobil Oil Corp.*, 523 F.2d 1153, 1161 (C.A.D.C. 1975).

Equally significant, the lower court clearly misconstrued and misapplied the basic rule of statutory construction cogently set forth by this Court in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974):[8]

[8] See, also, *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 61-62 (1978); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975); *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1942).

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills* v. *United States*, 278 U.S. 282, 289, 73 L Ed 379, 49 S Ct 129 (1929). This principle of statutory construction reflects an ancient maxim-expressio unius est exclusio alterius. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act. But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. Accordingly, we turn to the legislative history of § 307(a).

Applying this rule of statutory construction to the scheme of rights and procedures reviewed above, it is evident that the Act affirmatively describes the rights and powers of employees, the Secretary and the federal courts in situations involving danger in the workplace. The employee requests an inspection, the Secretary, if he so determines, brings the situation to the attention of the federal court, and the court may order immediate withdrawal of employees and suspend operations if necessary. The Act clearly limits the procedure in imminent danger situations to be done in this particular way. The Act withholds from anyone except the courts the right to determine that such a situation exists in fact, warranting such a remedy, and expressly provides the employee with the protected right to set in motion—"to institute or cause to be instituted"—the imminent danger procedure. Accordingly, under the "expressio unius est exclusio alterius" rule, it must be concluded that the Act denies

employees the right to determine that an imminent danger exists and denies them the power to suspend operations through self-help without resorting to the expressly established statutory procedure. In light of this rule, it is respectfully submitted that the court below erred in finding the existence of such an implied right and expanding the Act to subsume such a self-help remedy, unless the court could point to clear evidence of legislative intent to the contrary.

B. The Legislative History Contains No Evidence of Legislative Intent Implying the Right Created By the Secretary's Regulation.

As the Secretary's regulation acknowledges (29 C.F.R. § 1977.12(b)(1), *supra*) nothing in the legislative history suggests that employees should have the right to refuse to work and suspend business operations. Nothing in the decision below contradicts this admission. Rather, the lower court, applying a perverse interpretation of this Court's clearly enumerated rule of statutory construction, concluded that the pertinent legislative history on rights and procedures in imminent danger situations is irrelevant; concluded that Congress never addressed the question of employee rights, and concluded that the legislative history of a subsequent related statute indicates that Congress would have created the right if the issue had been addressed. *Whirlpool*, *supra*, 593 F.2d at 730, 733-736. It is submitted that in reaching these conclusions the lower court erred.

The legislative history of the Act discloses two series of events in which Congress expressly considered the rights and procedures applicable to imminent danger situations.[9] In fact, during the arduous process which cul-

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[9] The legislative history of the Act is found in Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History on the Occupational Safety and

minated in the passage of the Act, both the Senate and the House rejected proposals which would have given employees the right to refuse to work in the face of unsafe conditions, and both agreed instead on the provisions giving employees the right to request a special inspection and trigger the procedure for imminent danger situations.

In the House, this debate took place over two bills; one introduced by Representative Daniels and subsequently reported out of the Committee on Education and Labor, and one introduced by Representative Steiger as an amendment, in the nature of a substitute. Leg. Hist. at 721, 763, 831. In the reported Daniels bill, the Secretary's inspector was authorized to issue shut-down orders of five days duration, with the courts being empowered to extend this time if necessary. Leg. Hist. at 955-57. The minority members of the Committee viewed this provision with alarm, expressing a fear of the "great potential for misuse that would be created if this power were put in the hands of an inspector in the field" who could become "a pawn in labor disputes" subject to pressure "to shut down plants in cases other than *bona fide* imminent danger situations." Leg. Hist. at 885-87. Their view, which ultimately prevailed, was to repose such power exclusively in the federal courts. The reported bill also contained a controversial provision which would have given employees the right to leave a workplace with no earnings loss under certain circumstances, even if no imminent danger were present, and even if no inspection had been made. Leg. Hist. at 969-70. This provision became known as the "strike with pay" provision. The Committee justified this provision by saying that "[t]here is still a real danger that an employee may be economically coerced into self-exposure in order to

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Health Act of 1970 (Committee Print June, 1971), referred to in this brief as "Leg. Hist.". The Senate report and the Senate-House Conference report are also found in U.S. Code Cong. & Admin. News, 91st Cong., 2d Sess. 5177-5241 (1970).

earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay." Leg. Hist. at 860. The Steiger bill subsequently introduced contained no provision permitting employees to walk off the job under any circumstances, and granted to federal courts the power to issue withdrawal and suspension of operation orders. Leg. Hist. at 796-98. Later in the debates Representative Daniels recognized that House sentiment was leaning in favor of the Steiger bill, and offered amendments to his own bill in order "to alleviate fears that have been expressed [and] that while not interfering with its effectiveness, will reduce areas of concern . . ." Leg. Hist. at 1004. With respect to the pertinent issue here, he described his amendments as follows (Leg. Hist. at 1071):

> Second, in imminent danger situations, the Secretary will now be required to get judicial relief. We have eliminated the provision under which a plant could be closed by an administrative order.
>
> *Third, we have deleted a provision which was—though inaccurately—called a "strike with pay" provision and have provided that employees may request an inspection when they are subjected to dangers at the workplace.* (Emphasis added).

In justifying these amendments, he inserted in the Congressional Record the following (Leg. Hist. at 1008-1009):

> This amendment is a substitute for the provision in section 19 of the committee bill permitting employees to absent themselves from dangerous situations without loss of pay. When we get to Section 19 I will offer an amendment to delete that provision.
>
> The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm;

> instead we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. *Instead of making provisions for employees when their employer is not providing a safe work place, we have strengthened the enforcement by this amendment provision and tried to minimize the amount that employees will be subject to the risk of harm.* (Emphasis added).

Nevertheless, the House passed the Steiger bill which never contained a provision permitting employees to withdraw from the workplace and suspend business operations.

In the Senate, debate focused on the distinctions between a bill sponsored by Senator Williams and reported out by the Committee (Leg. Hist. at 141, 204) and one proposed by Senator Dominick which was identical to the Steiger bill. Leg. Hist. at 73. The Committee bill was similar to the Daniels bills, albeit somewhat more restrictive, in that it would have required the Secretary to obtain a federal court order to suspend business operations and withdraw employees, unless there was insufficient time to obtain such an order in which case the inspector, after obtaining concurrence of a regional Labor Department official, could issue a suspension order of three days duration. Leg. Hist. at 153, 362-64. But, the reported Williams bill did not contain any provision permitting employees to walk off the job with pay, in contrast to the Daniels bill. Instead, the Williams bill contained a request for inspection provision, almost identical to the Act's present provision, which specifically created an employee right to request a special inspection if imminent danger were believed to be present, and which required the Secretary to honor such a request if based on reasonable grounds. Leg. Hist. at 252-53. Significantly, this scheme was created by design and not by neglect, for the Committee had considered giving employees a right similar to that contained in the Daniels

bill, but rejected the idea in favor of the request for inspection procedure. As explained by Senator Williams (Leg. Hist. at 416):

> . . . the committee bill does not contain a so-called strike-with-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection.

Subsequently, Senator Williams described the distinctions which he felt made his bill preferable to the Dominick bill (Leg. Hist. at 432-33):

> The committee bill, while guarding against frivolous complaints, permits employees or their representatives to request inspections where they believe that a violation of a safety and health standard exists that threatens physical harm or that an imminent danger exists.
>
> The substitute bill has absolutely no comparable provision for what in so many clearly life and death instances is the minimum assurance to which the employee is entitled. . . .
>
> The Committee bill provides that in imminent danger situations *the Secretary may bring action* in the appropriate U.S. district court for a temporary restraining order or an injunction requiring steps to be taken to correct, remove, or avoid the danger, *and prohibiting the presence of individuals where the imminent danger exists.*
>
> * * * *
>
> The committee bill also permits *the Secretary*, if he determines that the danger of death or serious harm is so immediate that action must be taken

without awaiting the institution of court proceedings, *to order such action to be taken and his order may remain in effect for 72 hours.*

This is one of the areas in which there is clearly a distinction between the bill as reported by the committee and the substitute proposed. These are the true emergency situations where time manifestly is of the essence. (Emphasis added).[10]

The Senate passed the Williams bill (Leg. Hist. at 450) but in the Conference Committee the House provision giving the federal courts exclusive power to issue suspension and withdrawal orders was agreed to in conjunction with the Senate provision creating an express employee right to request a special inspection and trigger the imminent danger procedures.

As the foregoing review of the Act's legislative history demonstrates, both houses of Congress considered specific provisions dealing with employee rights and procedures to be followed in imminent danger situations. Nothing in this history provides *any* evidence contrary to the conclusion that Congress intended for the provisions of the Act to be the exclusive means of dealing with such situations. Rather, the "wholesale rejection" of the provision permitting employees to walk off with pay, and the granting to federal courts the authority to suspend business operations, demonstrate an "overriding concern of Congress" to avoid "unnecessary confrontations between employer and employees." *Daniel Construction, supra,* 563 F.2d at 714. The two criteria relied on by the lower court to dismiss this legislative intent are wholly without foundation.

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[10] The lower court's conclusion that these remarks, in context, demonstrate the consistency of the Secretary's regulation simply is not supportable. 593 F.2d at 733, note 44. There is nothing in the statement to indicate that Senator Williams, in making his comparison to the Dominick bill, ever contemplated an employee right to walk off the job. Indeed, neither bill contained such a provision.

First, the lower court dismissed this legislative history as irrelevant on the grounds that the debate focused on the "with pay" aspect of the proposed right, whereas the Secretary's regulation does not contemplate pay if an employee, with no reasonable alternative, walks off the job. *Whirlpool, supra,* 593 F.2d at 730-31. This begs the obvious question for, if that were the only concern, Congress was certainly capable of writing a similar provision in a more limited fashion. Moreover, this contention is not entirely accurate for, as the Committee Report accompanying the Daniels bill explained, the "earnings protion" meant that an employer could assign an employee to other work, at no loss in pay, during the duration of the hazardous condition, but would not have to pay for work not performed. Leg. Hist. at 860. This interpretation of the rejected provision is virtually identical to the construction given the Secretary's regulation. Finally, the lower court failed to acknowledge a prior action by the Secretary in which he determined that the Act's anti-discrimination provision requires employees to be paid for exercising their right to accompany an inspector during an inspection. 42 Fed. Reg. 47344, amending 29 C.F.R. § 1977.21 (September 20, 1977). This interpretation, which has recently been upheld by a district court,[11] is a complete reversal of the previous position taken by the Secretary, which held that such time was non-work activity and hence not compensable. 38 Fed. Reg. 2681 (January 29, 1973). Thus, the conclusion reached by the lower court is in direct contradiction to the interpretation of the anti-discrimination provision adopted by the Secretary. Indeed, the Secretary's rationale, that "failure to pay an employee for time spent during the walkaround will have a strong chilling effect on an employee's willingness to act as representative

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[11] See, *U.S. Chamber of Commerce* v. *OSHA,* —— F.Supp. ——, No. 77-1842 (D.C.D.C. 1979), appeal pending, No. 78-2221 (C.A. D.C.). But see, *Leone* v. *Mobil Oil Corp., supra,* 523 F.2d 1153.

of employees . . ." (42 Fed. Reg. 47344), must necessarily apply with equal force to the implied right created in his regulation, for the denial of pay to an employee who exercises that right must likewise have a similar "chilling effect". Thus, the lower court's decision does, in fact, set up the potential for a "strike with pay" which Congress expressly rejected.

The lower court's second basis for dismissing the Act's legislative history is based on its examination of the subsequent legislative history of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, amending the Federal Coal Mine Safety and Health Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969). *Whirlpool, supra*, 593 F.2d at 735-36. Specifically, the court noted that in amending the 1969 Act's anti-discrimination provision, which was the precursor of 29 U.S.C. § 660 (c) (1), the Congress in 1977 specifically indicated that the amended provision, 30 U.S.C. § 815(c) (1), should be construed to afford miners the right to refuse to work in the face of imminent dangers. *Id.* at 735. The court subsequently concluded that Congress could not have intended otherwise under this Act. But this chain of events supports a conclusion directly opposite that reached below. As this Court noted in *National Labor Relations Board* v. *Gullet Gin Co.*, 340 U.S. 361, 365-66 (1950), the action or inaction of a subsequent Congress is relevant to the question whether Congress is satisfied that a law is being properly interpreted and applied. Thus, the subsequent *action* by Congress in 1977, including the same congressional committees that reported out the 1970 OSH Act, indicates its belief that the 1969 Act, whose anti-discrimination provision closely parallels 29 U.S.C. § 660(c) (1), did *not* authorize such a right, and its *inaction*, again *the same congressional committees*, in similarly amending or even mentioning OSHA is compelling evidence that no such right was intended under the Act. Similarly, the specific congressional reference

of an intent to overrule an administrative decision under the 1969 Act,[12] with no such reference by Congress to federal court decisions adverse to the Secretary's regulation here in issue[13] is further evidence that Congress had no intention of implying a similar right under the Act.

Thus, this is not a situation in which "the courts must . . . in effect, consider what answer the legislature would have made as to a problem that was neither discussed or contemplated." *Whirlpool, supra* at 735, quoting *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 380 (C.A.D.C. 1973), *cert. den.*, 417 U.S. 91. As demonstrated, the issue was thoroughly discussed and a solution reached. But even assuming, *arguendo*, that the court's contention is correct, the following observation subsequently made by the District of Columbia Circuit in considering a similar issue under the Act is more appropriate (*Leone* v. *Mobil Oil Corp., supra*, 523 F.2d at 1161):

> . . . This lack of acknowledgement of the issue may indicate that Congress did not *consider the problem* at the time OSHA was adopted. Whether Congress deliberately or *unconsciously omitted* provisions . . . for employees, however, the questions *remains one properly reserved to the legislative process.* We are particularly unwilling to supply this policy decision where Congress has evidenced as a continuing interest in the legislation and where the statute provides a method of bringing such problems before Congress through the efforts of the Secretary of Labor. (Footnote omitted). (Emphasis added).

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[12] *Whirlpool, supra* at 736.

[13] The decisions of the federal district courts in *Daniel Construction*, and *Whirlpool* were rendered in 1976. See, e.g., 416 F.Supp. 30 (N.D. Ohio 1976).

C. The Secretary's Regulation is Inimical to the Act's Statutory Scheme and is Unnecessary to Protect Employees From Imminent Danger.

As demonstrated in the foregoing analysis, the arguments advanced by the lower court do not suffice as a basis for amendment of the Act by administrative dictate. The analytical method developed by this Court to determine if an implied right exists requires close examination of the scheme of the statute, its legislative history and the effect such a right would have on the scheme established by Congress to accomplish the purpose of the statute. *SIPC* v. *Barbour*, *supra*, 421 U.S. at 419-21; *Cort* v. *Ash*, *supra*, 422 U.S. at 78. In these cases, this Court denied a claim to an implied right of action because such action might disrupt the scheme established by Congress to achieve its legislative purpose, *and* because there was no evidence of legislative intent to permit such action. Applying this method to the regulation here in issue, it is submitted that the lower court erred in upholding the implied right created by the Secretary.

There is no argument that the broad general purpose of the Act is to assure employees safe and healthful working conditions, and that a more specific purpose is to assure employees protection from exposure to the risk of serious physical harm and imminent danger. 29 U.S.C. §§ 651(b), 657(f)(1); 662(a). But it is equally clear that the Act encourages employers and employees to work together toward reducing safety and health hazards in the workplace and, more specifically, assures that swift but orderly and objective procedures are followed in situations involving such risks; to which end the authority to determine that a cessation of business operations is necessary because of hazardous conditions is lodged exclusively in the judiciary. This carefully worked out statutory scheme is compelling evidence that Congress did not intend, indeed went to great pains to specifically avoid,

putting employers and employees in an adversarial relationship under the Act. It is evident, however, that the Secretary's regulation would frustrate this Congressional purpose, for it can only encourage numerous disputes between conflicting, albeit "good faith" beliefs over whether or not such walkouts are justified; no doubt many of these disputes would end up in federal court. In short, the orderly and objective scheme of the Act and its specific purposes cannot be reconciled with the implied right sought herein.

Yet the lower court upheld the implication of this right on the grounds that it filled a gap in employee protection; that it eliminated putting an employee in the position of choosing between his or her job and his or her safety. This observation suggests, of course, that employers would force employees into making such a choice, and it is strongly submitted that such a contention is unwarranted. Congress itself refused to make this assumption, for there was no disagreement when it was noted that an employer informed of an apparent hazardous condition would "99 times out of 100" seek to ascertain and ultimately correct it.[14] By establishing the procedures it did, Congress thus determined that an employer's decision to continue work must be accorded "good faith".[15] And where Congress has given employers the benefit of the doubt, the courts should do likewise.

Where a "good faith" disagreement exists, then resort to the statutory procedure is available, and is clearly protected activity. In fact, the Act's already existing provisions are designed so that an employee need never face the choice perceived by the court below. To demonstrate this, one need only examine the interpretation given the

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[14] See, 116 Cong. Rec. 38,367-368; 116 Cong. Rec. 37,237-346 (1970).

[15] See, e.g., *Daniel Construction*, *supra*, 563 F.2d at 716, note 21.

Act's anti-discrimination provision by the courts, and the Secretary's procedure for dealing with imminent danger allegations.

The courts have interpreted the Act's anti-discrimination provision broadly, concluding that an employee's participation in protected activity need not be the sole consideration behind discharge or other discriminatory action by an employer. If the discrimination would not have taken place "but for" the protected activity, or the activity is a substantial reason for the discrimination, then 29 U.S.C. § 660(c)(1) has been violated.[16] 29 C.F.R. 1977.6 (b). The case of *Dunlop* v. *Trumbull Asphalt Co., supra,* is a good example of the court's willingness to find the protected activity as the motivation behind discriminatory action. There the court found that an employee who initiated a complaint pursuant to 29 U.S.C. § 657 and who also engaged in a work stoppage was discharged for filing the complaint and not for the absence which followed, and was therefore discriminated against in violation of the Act.

Turning to the Secretary's procedure for handling imminent danger complaints,[17] he has accorded such allegations the "highest priority", the expedited and thorough handling of which must not be interfered with by other considerations. The evaluation of the allegation, whatever its form, is to be accomplished "immediately" and an inspection conducted within twenty-four hours. In addition, the Secretary's representative is to contact the employer "immediately" upon receipt of the allegation, ascertain the facts, attempt to have any affected em-

[16] See, e.g., *Dunlop* v. *Trumbull Asphalt Co.*, —— F.Supp. ——, No. 75-1025, 4 OSHC 1847 (E.D. Mich. 1976); *Dunlop* v. *Hanover Shoe Farms, Inc.*, —— F.Supp. ——, No. 75-1243, 4 OSHC 1241 (M.D. Pa. 1976).

[17] U.S. Dept. of Labor, *Field Operations Manual*, Ch. IX, reprinted in 1 CCH ESHG ¶ 4370.2 (January 1979).

ployees voluntarily removed, and determine the steps the employer intends to initiate to eliminate the danger.

Taken together, the above demonstrates that the Act already provides ample protection for employees. If an employee believes an imminent danger exists, he has an absolute right to "institute or cause to be instituted" any proceeding under the Act; in this case the imminent danger procedure. An employer who discriminates against the employee while he or she is in the process of, or subsequent to, the exercise of that right would have to overcome the "but for" test developed by the courts. In addition, the Secretary will become involved in the matter quickly, and the employer will be informed of that involvement. An employer must then be willing to risk the severe penalties associated with a willful violation of the Act[18] if he takes no action to protect his employees. Thus, the statutory scheme provides ample protection yet permits an orderly and objective determination of the situation.

Surely, this procedure is preferable to the potential for disputes and litigation inherent in the Secretary's regulation. With so many subjective judgements to be made, i.e., whether there is a "good faith" belief about the situation; what is "insufficient time" to invoke the normal statutory procedure, what constitutes a "reasonable alternative" to walking off the job, the potential for abuse is obvious. Indeed, this Court itself was concerned about the problems inherent in such subjectivity when, in *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 386 (1974), it was noted that "[i]f the courts require no objective evidence that such conditions actually obtain, they face a wholly speculative inquiry into the motives of workers."

[18] What constitutes a "willful" violation, and the penalties associated with such a violation are discussed *supra* at 7.

Congress clearly sought to eliminate such "wholly speculative inquiry" by placing with the courts the authority to determine, in fact, that a dangerous situation exists, and empowering the courts to take any appropriate action. But Congress also clearly sought to protect employees by giving them the express right to institute the procedures leading to the court's determination. The Secretary's regulation all but eviscerates the carefully enacted scheme. Accordingly, the decision of the lower court should be reversed.

II. THE SECRETARY'S REGULATION IMPROPERLY INTERFERES WITH WELL SETTLED NATIONAL LABOR POLICY.

That Congress did not intend to give the Secretary authority to create the right established by his regulation is further confirmed by the fact that the regulation is highly disruptive of labor-management relations. By imposing through administrative fiat what parties are required to negotiate, the Secretary has improperly intruded into the area of collective bargaining.

Although safety and health regulations are not necessarily invalid merely because they may affect matters which also are, or could be, the subject of negotiations between management and labor, the Secretary, lacking explicit authority in this area, cannot infer an implied right or power in a manner which does violence to well established national labor policy.[19] That policy is "to encourage the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife,"

[19] Indeed, the Third Circuit has held that the issues of payment for personal protective equipment and the sanctioning of noncomplying employees are not within, or subsumed by, the Act's mandate but are exclusively within the province of collective bargaining. *Budd Co.* v. *OSHRC*, 513 F.2d 201 (C.A. 3 1975); *Atlantic and Gulf Stevedores, Inc.* v. *OSHRC, supra*, 543 F.2d 541.

without concerning the government with "the substantive terms upon which the parties agreed." *Local 24* v. *Oliver*, 358 U.S. 283, 285 (1959). The Secretary and the lower court have ignored that policy.

Safety and health matters have long been recognized as mandatory, hardcore subjects of collective bargaining, *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), and safety disputes are proper subjects for arbitration. *Gateway Coal Co.* v. *United Mine Workers, supra*, 414 U.S. 368.[20] If Congress had intended to authorize the Secretary to remove these traditionally bargainable subjects from the collective bargaining table and to dictate their treatment as a matter of law, it would have done so explicitly. When, as here, the Secretary has no express authority to regulate the subject, and when, as here, the subject is a mandatory topic of collective bargaining, then a proper balancing of the policies of the Act and the National Labor Relations Act (29 U.S.C. §§ 141, *et seq.*, hereafter NLRA) requires the Secretary and the courts to leave such matters to the collective bargaining process. See, *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975). By not carefully balancing these two policies, and by relying on the Act's broad general policy to uphold the regulation, the lower court has virtually granted the Secretary carte blanche to promulgate, as amendments to the NLRA, any regulation which is arguably consistent with that broad policy. However, as has been suggested:

> A much more cautious approach to implied amendments of the NLRA is required if the Court is to give proper effect to the legislative judgments of the Con-

[20] In one study, safety and health provisions were found in over 80 percent of collective bargaining agreements. See, *Basic Patterns: Working Conditions—Safety and Health* (BNA 1979); see, also, Davis, *Union Contract Language With Teeth*, 35 Guild Practioner 61 (1978).

> gress. Having once resolved the balance to be struck in the collective-bargaining relationship, and having embodied that balance in the NLRA, Congress should not be expected by the Court to reaffirm the balance explicitly each time it later enacts legislation that may touch in some way on the collective bargaining relationship. Absent explicit modification of the NLRA, or clear inconsistency between the terms of the NLRA and a subsequent statute, the Court should assume that Congress intended to leave the NLRA unaltered. (Footnote omitted).

New York Telephone Co. v. *New York Labor Dept.*, —— U.S. ——, 59 L.Ed. 2d 553, 585 (1979) (Powell, J. dissenting).

It is submitted that the Secretary's regulation thrusts both him and the Act into the field of labor-management relations thereby defeating the express Congressional intent to "achieve coordination" between the Act and "other federal laws", and to avoid "duplication". 29 U.S.C. § 653(b)(3). Indeed, if upheld, this regulation can, at best, only cause additional confusion in a field that has been a source of conflict in labor-management relations; the enforcement of the no strike-no lockout and arbitration provisions of collective bargaining agreements. Moreover, the obvious possibility of duplicative litigation in different forums with inconsistent results,[21] may lead to omitting safety disputes from collective bargaining agreements entirely, or specifically excluding them from arbitration; a result in direct conflict with this Court's interpretation of national labor policy. The following analysis illustrates the problem.

Subsumed in an employee's right under section 7, 29 U.S.C. § 157, of the NLRA to strike, engage in collective

[21] In *Garner* v. *Teamsters Local 776*, 346 U.S. 485 (1953), this court counselled against a "multiplicity of tribunals" to avoid producing "incompatible or conflicting adjudications". *Id.* at 490-91.

bargaining and other concerted activity is the right to engage in such activity over safety matters. As confirmed by this Court in *NLRB* v. *Washington Alumnium Co.*, 370 U.S. 9 (1962), section 7 protects strikes to protest unsafe working conditions so long as there is a good faith belief that such conditions exist. The National Labor Relations Board (NLRB) has continually affirmed this right, broadening the concept of concertedness to apply to a single employee's efforts to secure compliance with job safety laws. *Alleluia Cushion Co.*, 221 NLRB 999 (1975).[22] This belies any notion that employees are faced with a "Hobsons choice" between jobs and safety, but more importantly it means that courts, in deciding cases brought by the Secretary under his regulation, will be intruding into areas of labor law previously thought to be within the exclusive province of the NLRB. See, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959).

More important, an employer can protect itself against work stoppages over safety disputes by negotiating a no-strike provision into its collective bargaining agreement, thereby making such stoppages during the term of the agreement unprotected activity subject to disciplinary action, including discharge. *NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332 (1939). Further, if the safety dispute is subject to a contractual grievance procedure culminating in a final and binding award, an employer may enjoin the work stoppage over the dispute by resorting to the procedures contained in section 301 of the NLRA, 29 U.S.C. § 186. *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970); *Gateway Coal Co.* v. *United*

[22] *Accord, Jim Causley Pontiac*, 232 NLRB 37 (1977); *B & P Motor Express, Inc.*, 230 NLRB 96 (1977). *See*, also, *Welco Industries Inc.*, 237 NLRB 46 (1978).

Mine Workers, supra; Cf. *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397 (1978).

There is, however, an exception to the section 301 strike insulation, set forth in section 502 of NLRA, 29 U.S.C. § 143, which provides, in pertinent part:

> . . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

As its language suggests, this provision allows employees to strike in protest over safety conditions regardless of a contractual no-strike commitment, because a safety strike over "abnormally dangerous conditions" is not a strike under the NLRA. However, in *Gateway Coal, supra,* at 387, this Court required that to establish a section 502 defense to a *Boys Markets* injunction "ascertainable, objective evidence" must be presented to support the conclusion that an "abnormally dangerous condition for work exists". Without such evidence, an employee's subjective, albeit good faith determination that such conditions exist does not alone justify a refusal to work, and such refusal would be in violation of the no strike clause and unprotected under the NLRA. Discipline in such cases can, due to emotions involved, precipitate even broader work stoppages, but may be necessary to enforce the no-strike clause, and thus maintain the vitality of its *quid pro quo;* the agreement to submit such disputes to arbitration.

However, the Secretary's regulation has effectively eliminated this framework, without any express intention of Congress to modify section 502 or the enforceability of collective bargaining agreements. In fact, there is no express provision in the Act, equivalent to section 502, which treats a work stoppage over a safety dispute as anything other than a strike, nor does the legislative history indicate that a refusal to work over safety conditions is not a strike, or is otherwise permitted. Thus, there is nothing in the Act which creates an exception to a no-strike pledge or to an agreement that safety disputes be arbitrated. But, if, as the lower court contends, the Act implies a right to refuse to work in certain circumstances then, to the extent that such a right exists, a work stoppage under the Act would be outside the scope of a no-strike obligation and would not be subject to injunctive relief.

Moreover, "imminent danger" as defined in 29 U.S.C. § 662(a), *supra,* and as interpreted in the Secretary's regulation, is hardly synonomous, with "abnormally dangerous conditions". Indeed, a job may be inherently dangerous, although not abnormally so under section 502, and therefore outside its protection.[23] Yet the same job may constitute a "real danger" under the Secretary's regulation, which does not require "ascertainable, objective evidence" but only a subjective good faith belief that such a condition exists. *Gateway Coal, supra.* Accordingly, wholly apart from injunctive relief, if employees have an implied right under the Act to refuse to work in "imminent danger" situations then, to that extent, a no-strike pledge may be violated with impugnity for there would be no method to enforce the requirement to arbitrate.

Thus, the Secretary's regulation has created an exception to section 301 relief where employees cannot satisfy the section 502 criteria but fall within the implied right created, and has vitiated the ability to enforce binding arbitration. Such a situation "presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful reso-

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[23] *Philadelphia Marine Trade Association* v. *NLRB,* 330 F.2d 492 (C.A. 3 1964), *cert. den.,* 379 U.S. 841 (1964).

lution of labor disputes . . ." *Boys Markets, supra,* 398 U.S. at 253.

Accordingly, because the court below failed to recognize the serious implications of the regulation on labor-management relations, its decision is in error.

CONCLUSION

For the reasons set forth above, and those in the Petitioner's brief, it is respectfully requested that the judgment of the lower court be reversed.

Respectfully submitted,

Of Counsel:

STEPHEN A. BOKAT
STANLEY T. KALECZYC
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062

ROBERT T. THOMPSON
GARY S. KLEIN
THOMPSON, MANN & HUTSON
1511 K Street, N.W.
Washington, D.C. 20005

Attorneys for the
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing brief *Amicus Curiae* were served on this 15 day of November, 1979, by depositing same in the mail, postage prepaid, certified mail, addressed to the following:

Hon. Wade H. McCree Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Carin A. Clauss
Solicitor of Labor
U.S. Dept. of Labor
Washington, D.C. 20210

Robert E. Mann
Seyforth, Shaw, Fairweather & Geraldson
Suite 400
55 East Monroe Street
Chicago, Illinois 60603

/s/ Robert T. Thompson
ROBERT T. THOMPSON